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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 78

**DECISIONS RENDERED BETWEEN OCTOBER 22, 1915, AND
JANUARY 18, 1916**

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1916

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IN THE

STATE OF OREGON

January 18, 1916.

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Curry } JOHN S. COKE, Marshfield.
Douglas }
Benton } JAMES W. HAMILTON, Roseburg.
Lane }
Lincoln } GEORGE F. SKIPWORTH, Eugene.

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Marion } WILLIAM GALLOWAY, Department No. 2, Salem.

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Multnomah }
JOHN P. KAVANAUGH, Department No. 1, Portland.
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Wallowa		

Eleventh Judicial District—

Gilliam	}	DAVID B. PARKER, Cocon.
Sherman		
Wheeler		

Twelfth Judicial District—

Polk	}	HARRY H. BELT, Dallas.
Yamhill		

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		DELMON V. KUYKENDALL†

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Eighteenth Judicial District—

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Jefferson		

Nineteenth Judicial District—

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Washington		

Twentieth Judicial District—

Clatsop	}	JAMES A. EAKIN, Astoria.
Columbia		

*Died October 25, 1915.

†Appointed October 26, 1915.

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

January 18, 1916.

County.	Name.	Official Address.
Baker.....	Godwin, C. T.....	Baker
Benton.....	Clarke, Arthur.....	Corvallis
Clackamas.....	Hedges, Gilbert L.....	Oregon City
Clatsop.....	Mullins, C. W.....	Astoria
Columbia.....	Cooper, W. H.	St. Helens
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Crook.....	Wirtz, Willard H.....	Prineville
Curry.....	Johnson, James C.	Gold Beach
Douglas.....	Neuner, Jr., George.....	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
Grant.....	Cozad, V. G.....	Canyon City
Harney.....	Sizemore, Geo. S.....	Burns
Hood River.....	Derby, A. J.....	Hood River
Jackson.....	Kelly, E. E.....	Medford
Jefferson.....	Myers, W. F.....	Culver
Josephine.....	Miller, W. T.....	Grants Pass
Klamath.....	Irwin, John.....	Klamath Falls
Lake.....	Gibbs, O. C.....	Lakeview
Lane.....	Devers, Joseph M.....	Eugene
Lincoln.....	Stewart, J. F.....	Toledo
Linn.....	Hill, Gale S.....	Albany
Malheur.....	Brooke, W. H.....	Ontario
Marion.....	Ringo, Ernest R.....	Salem
Morrow.....	Wells, Glenn Y.....	Heppner
Multnomah.....	Evans, Walter H.....	Portland
Polk.....	Sibley, Joseph E.....	Dallas
Sherman.....	Huddleston, C. M.....	Wasco
Tillamook.....	Goyne, T. H.	Tillamook
Umatilla.....	Steiner, Frederick H.....	Pendleton
Union.....	Eberhard, Colon R.	La Grande
Wallowa.....	Corkins, O. M.....	Enterprise
Wasco.....	Bell, W. A.....	The Dalles
Washington.....	Tongue, E. B.....	Hillsboro
Wheeler.....	Starr, J. K.....	Fossil
Yamhill.....	Conner, R. L.....	McMinnville

TABLE OF CASES REPORTED.

In cases where municipalities are parties they are placed under the name of the city or county, and not under the letter "C."

A	PAGE
Adams v. Corvallis & E. R. Co.....	117

B	
Barnhart, Yeaton v.....	249
Barton v. Young.....	215
Birnie v. La Grande.....	531
Bohrer, Weiser Land Co. v.....	202
Bouchet v. Oregon Motor Car Co.....	230
Bowers, Ex parte.....	390
Bowers v. Grant.....	390
Butts, State v.....	173

C	
Calchina, McHargue v.....	320
Camp & Du Puy v. Lauterman.....	134
Campbell's Gas Burner Co. v. Hammer.....	612
Cantrall, Fretland v.....	439
Case, Edwards v.....	220
Catherine Creek Development Co., Hall v.....	585
Cooley v. Snake River Imp. Co.....	384
Cooper v. Hillsboro Garden Tracts.....	74
Corvallis & E. R. Co., Adams v.....	117

D	
Dalton, York v.....	304
Davin Land Co. v. School Dist. No. 71.....	273
District School Board, Richards v.....	621

E	
Edwards v. Case.....	220
Evanhoff v. State Industrial Acc. Com.....	503
Ex parte Bowers.....	390

F	
Farmers' Mercantile Co., Metzler Lbr. Co. v.....	551
Fellman v. Tidewater Mill Co.....	1
First Nat. Bank v. Seawear.....	567
Fretland v. Cantrall.....	439

G	
Goff v. Kelsey.....	337
Grabill, Haines Commercial Co. v.....	375
Grant, Bowers v.....	390
Grice v. Oregon-Wash. R. & N. Co.....	17

TABLE OF CASES REPORTED.

ix

H	PAGE
Haines Commercial Co. v. Grabill.....	375
Hall v. Catherine Creek Development Co.....	585
Hammer, Campbell's Gas Burner Co. v.....	612
Hammond Lumber Co., Ramaswamy v.....	407
Hansel v. Norblad.....	38
Hanson, Somers v.....	429
Hare, State ex rel. v.....	540
Heckinger v. Swank.....	526
Hegdale v. Wade.....	349
Henderson v. Tillamook Hotel Co.....	444
Henrickson v. Hillsboro Garden Tracts.....	96
Hillsboro Garden Tracts, Cooper v.....	74
Hillsboro Garden Tracts, Henrickson v.....	96
Hillsboro Garden Tracts, Marshall v.....	89
Hoefler v. Mickle.....	399
Holden, School Dist. No. 35 v.....	267
Home Telephone & Telegraph Co., Kahn v.....	308
Hunter, Taggart v.....	139
Hyde v. Kirkpatrick.....	466

J

Jenkins v. Owyhee Ditch Co.....	277
---------------------------------	-----

K

Kahn v. Home Telephone & Telegraph Co.....	308
Kelsey, Goff v.....	337
Kingman Colony Irr. Co. v. Payne.....	238
Kirkpatrick, Hyde v.....	466

L

La Grande, Birnie v.....	531
Lauterman, Camp & Du Puy v.....	134
Lewis, Peterson v.....	641
Link, Riddle State Bank v.....	498
Lombard, Roberts v.....	100

Mo

McHargue v. Calchina.....	320
McMahan, Salem-Fairfield Telephone Assn. v.....	477

M

Mallett v. Taylor.....	208
Marshall v. Hillsboro Garden Tracts.....	89
Metzler Lbr. Co. v. Farmers' Mercantile Co.....	551
Mickle, Hoefler v.....	399
Miller v. Portland.....	165
Miller v. Weaver.....	594
Mills, Reed v.....	558
Mitchell v. Sturtevant.....	214
Montesano Lbr. Co. v. Portland Iron Wks.....	53

N

New England Casualty Co., Portland v.....	195
Niehaus v. Shetter.....	447

	PAGE
Norblad, Hansel v.....	38
Northern Brewery Co. v. Princess Hotel.....	458

O

Oberlin v. Oregon-Washington R. & N. Co.....	301
Oregon Motor Car Co., Bouchet v.....	230
Oregon-Wash. R. & N. Co., Grice v.....	17
Oregon-Washington R. & N. Co., Oberlin v.....	301
Oregon-Washington R. & N. Co., Spain v.....	355
Ottenheimer, Eugenstein v.....	371
Owyhee Ditch Co., Jenkins v.....	277

P

Payne, Kingman Colony Irr. Co. v.....	238
Peterson v. Lewis.....	641
Peterson v. Thompson.....	158
Portland, Miller v.....	165
Portland v. New England Casualty Co.....	195
Portland Iron Wks., Montesano Lbr. Co. v.....	53
Princess Hotel, Northern Brewery Co. v.....	458

R

Ramaswamy v. Hammond Lumber Co.....	407
Reed v. Mills.....	558
Richards v. District School Board.....	621
Riddle State Bank v. Link.....	498
Rider, State ex rel. v.....	318
Roberts v. Lombard.....	100
Rugenstein v. Ottenheimer.....	371
Rush v. School Dist. No. 5.....	485

S

Salem-Fairfield Telephone Assn. v. McMahan.....	477
School Dist. No. 3, State ex rel. v.....	188
School Dist. No. 5, Rush v.....	485
School Dist. No. 35 v. Holden.....	267
School Dist. No. 71, Davin Land Co. v.....	273
School Dist. No. 1, Richards v.....	621
Schucking v. Young.....	483
Seawear, First Nat. Bank v.....	567
Shetter, Niehaus v.....	447
Snake River Imp. Co., Cooley v.....	384
Somers v. Hanson.....	429
Spain v. Oregon-Washington R. & N. Co.....	355
Stalker v. Stalker.....	291
State v. Butts.....	173
State ex rel. v. Hare.....	540
State ex rel. v. Rider.....	318
State ex rel. v. School Dist. No. 3.....	188
State Industrial Acc. Com., Evanhoff v.....	503
State Industrial Acc. Com., Upton v.....	525
Sturtevant, Mitchell v.....	214
Sutton v. Sutton.....	9
Swank, Heckinger v.....	526

TABLE OF CASES REPORTED.

xi

T		PAGE
Taggart v. Hunter.....		139
Taylor, Mallett v.....		208
Thompson, Peterson v.....		158
Thompson, Twitchell v.....		285
Tidewater Mill Co., Fellman v.....		1
Tillamook Hotel Co., Henderson v.....		444
Twitchell v. Thompson.....		285
U		
Upton v. State Industrial Acc. Com.....		525
W		
Wade, Hagdale v.....		349
Weaver, Miller v.....		594
Weiser Land Co. v. Bohrer.....		202
Wood v. Wood.....		181
Y		
Yeaton v. Barnhart.....		249
Yerk v. Dalton.....		304
Young, Barten v.....		215
Young, Schucking v.....		483

TABLE OF CASES CITED.

A	PAGE
Acme Dairy Co. v. Astoria, 49 Or. 520.....	194
Adams v. Brosius, 69 Or. 513.....	363
Adams Express Co. v. Carnahan, 29 Ind. App. 605.....	31
Alexander v. Walter, 8 Gill (Md.), 239.....	387
Allday, 15 Eng. Rul. Cas. 285.....	114
Allen v. Ayer, 26 Or. 589.....	599
Allen v. Barrett, 213 Mass. 36.....	114
Allen v. City of Detroit, 167 Mich. 464.....	113
Allen v. Leavens, 26 Or. 164.....	323
Allin v. Connecticut River Lumber Co., 150 Mass. 560.....	64, 65
Altona v. Dabney, 37 Or. 334, 336.....	228
American Contract Co. v. Bullen Bridge Co., 29 Or. 549 (in Dis. Opn.).....	604
American Surety Co. v. Cement Co., 110 Fed. 717.....	202
Anderson v. Adams, 43 Or. 621.....	473
Andrews v. Hoeslich, 47 Wash. 220.....	563
Ansley v. Bank of Piedmont, 113 Ala. 467.....	95
Applegate v. Dowell, 15 Or. 513, 516.....	617
Armstrong v. Town of Cosmopolis, 32 Wash. 110.....	369
Ashmore v. Pa. Stream Towing & Trans. Co., 28 N. J. Law, 180..	38
Atchison etc. Ry. Co. v. Baldwin, 53 Colo. 416.....	32

B	PAGE
Bade v. Hibberd, 50 Or. 501.....	83
Baker v. Seawear, 63 Or. 350.....	27, 110
Baldwin v. Abraham, 57 App. Div. 67, 67 N. Y. Supp. 1079.....	315
Balue v Taylor, 136 Ind. 368.....	95
Bank v. Spicer, 6 Wend. (N. Y.) 443.....	435
Banker's Nat. Bank v. Western Union Cold Storage Co., 73 Ill. App. 410.....	593
Banque v. Brown, 34 Fed. 162.....	95
Barrett v. Schleich, 37 Or. 613.....	298, 342
Barr v. Warner, 38 Or. 109, 111.....	228
Barrett v. Failing, 8 Or. 152.....	617
Barse Livestock Co. v. Range Valley Cattle Co., 16 Utah, 59.....	207
Bartelt v. Smith, 145 Wis. 31.....	461
Barthel v. Board of Education, 153 Cal. 376.....	628, 629, 637
Barton v. School Dist., 77 Or. 30.....	629
Baxter v. Davis, 58 Or. 109.....	629
Beamish v. Noon, 76 Or. 415.....	484, 495
Beard v. Beard, 66 Or. 526.....	344
Bell v. Keepers, 39 Kan. 105.....	86
Belle v. Brown, 37 Or. 588.....	617
Benson v. Keller, 37 Or. 120.....	5, 619
Benson v. Oregon Short Line R. R. Co., 35 Utah, 241.....	33
Bickel v. Wessinger, 58 Or. 98.....	452
Biggs v. McBride, 17 Or. 640.....	629, 641
Birch v. Abercrombie, 74 Wash. 486.....	312
Black v. Irvin, 76 Or. 561.....	355

TABLE OF CASES CITED.

xiii

	PAGE
Blackwood v. Van Vleit, 30 Mich. 118.....	387
Blair v. American Forwarding Co., 159 Ill. App. 511.....	32
Board v. U. S. Fidelity & Guaranty Co., 155 Mo. App. 109.....	198
Board of Street Commrs. v. Williams, 96 Md. 232.....	630, 641
Bogard v. Board of Education, 106 App. Div. 56.....	628
Bolton v. Gilleran, 105 Cal. 244.....	169
Bower v. Bowser, 49 Or. 182.....	472
Bowsman v. Anderson, 62 Or. 431.....	620
Boyer v. N. P. R. Co., 8 Idaho, 74.....	417
Branch v. Albee, 71 Or. 188.....	194
Brewer v. Horst-Lachmund Co., 50 L. R. A. 240 (note).....	150
British South Africa Co. v. Companhia de Mocambique, [1893] App. Cas. 602.....	63, 64
Brown v. Irwin, 47 Kan. 50.....	65
Brown v. Lewis, 50 Or. 358, 363.....	442
Brown v. Oregon Lumber Co., 24 Or. 317.....	128, 128
Brown v. Oregon-W. R. & N. Co., 63 Or. 409.....	425
Brown v. Owen, 23 South. 35.....	629
Burger v. Taxicab Motor Co., 66 Wash. 676.....	314
Burkhart v. Hart, 36 Or. 586 (in Dis. Opn.).....	608
Butler Ballast Co. v. Hoshaw, 94 Ill. App. 68.....	131
Butts v. Purdy, 63 Or. 150.....	174, 180

C

California Powder Works v. Atlantic & Pacific R. R. Co., 113 Cal. 329.....	31
Campbell's Gas Burner Co. v. Hammer, 78 Or. 612.....	481
Carroll v. Grande Ronde Elec. Co., 49 Or. 477.....	442
Case v. Noyes, 16 Or. 329, 333.....	228
Caspary v. Portland, 19 Or. 496.....	431
Cawfield v. Smyth, 69 Or. 41.....	7
Cerny v. Paxton & Gallagher Co., 78 Neb. 134.....	95
Chase v. Lowell, 7 Gray (Mass.), 33.....	147
Chase v. Treasurer of Los Angeles, 122 Cal. 540.....	170
Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205, 210.....	131, 131
Chicago etc. Ry. Co. v. Long, 26 Tex. Civ. App. 601.....	425
Chicago etc. Ry. Co. v. Titterington, 84 Tex. 218.....	95
Chicago, E. I. & P. Ry. Co. v. Dey, 76 Iowa, 278.....	180
Church v. Brown, 21 N. Y. 315.....	149
City of Chicago v. Wilder, 184 Ill. 397.....	169
City of McMinnville v. Howenstine, 56 Or. 451, 456.....	270
Clark v. Bundy, 29 Or. 190.....	344
Clark v. Hindman, 46 Or. 67.....	5, 620
Clark v. Irvin, 9 Ohio, 131.....	364
Clemmensen v. Peterson, 35 Or. 48, 49.....	654
Cline v. Greenwood, 10 Or. 230.....	522
Coffin v. Board of Education, 114 Mich. 342.....	625
Coin v. J. H. T. Lounge Co., 222 Mo. 488.....	128
Colgan v. Farmers & Mechanics' Bank, 69 Or. 357.....	618
Commercial Bank v. Sherman, 28 Or. 573.....	207
Commonwealth ex rel. v. Board of Education, 187 Pa. 70.....	626
Coney v. Timmons, 16 S. C. 378.....	297
Conn v. Board of County Commissioners, 151 Ind. 517.....	651
Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261.....	87
Cook v. Darling, 160 Mich. 475.....	236

	PAGE
Cook v. Howard, 59 Or. 372.....	276
Cooke v. Portland, 69 Or. 572.....	272
Cooper v. Hillsboro Garden Tracts, 78 Or. 74.....	91
Copeland v. Tweedle, 61 Or. 303.....	115, 593
Coquille Mill & Mercantile Co. v. Johnson, 52 Or. 547.....	4
Corbley v. Wilson, 71 Ill. 209.....	364
Cotton v. United States, 11 How. 229.....	64
Cragin v. Lovell, 88 N. Y. 258.....	64, 72
Crawford v. School Dist., 63 Or. 388.....	629
Creecy v. Joy, 40 Or. 28.....	83
Crosby v. Portland Ry., L. & P. Co., 53 Or. 496.....	150
Cunningham v. Fort Pitt Bridge Wks., 197 Pa. 625.....	129
Cunningham v. Klamath Lake Co., 54 Or. 13.....	417, 417, 419
Currey v. Butcher, 37 Or. 380.....	83

D

Dahms v. Sears, 13 Or. 47.....	86
David v. Portland Water Committee, 14 Or. 109, 110.....	193
Davis v. Bronson, 2 N. D. 300.....	248
Davis v. Leicester, 63 L. J. Ch. Div. (N. S.) 440.....	114
Davis v. Mitchell, 72 Or. 165.....	83, 331
Dawe v. Morris, 149 Mass. 188.....	95
Day v. Ft. Scott Investment Co., 153 Ill. 293.....	95
Dees v. Board of Education, 109 N. W. 39.....	626
De Lore v. Smith, 67 Or. 304, 309.....	563
Denver v. Mullen, 7 Colo. 345.....	212
Dickinson v. Burrell, L. R. 1 Eq. 337.....	87
District Land Co., 15 Eng. Rul. Cas. 285.....	114
Dodge v. Chandler, 13 Minn. 114 (in Dis. Opn.).....	608
Dodge v. Colby, 108 N. Y. 445.....	64
Doidge v. Bruce, 116 N. W. (Iowa) 726.....	180
Dose v. Beatie, 62 Or. 308.....	619
Dresher v. Becker, 88 Neb. 619.....	593
Drummond v. Miami Lbr. Co., 56 Or. 575.....	276
Du Breuil v. Pennsylvania Co., 130 Ind. 137.....	65
Duester v. Alvin, 74 Or. 544.....	113, 113, 114, 115
Dunham v. Monumental S. Min. Co., 9 Or. 41.....	625
Durkheimer v. Copperopolis Copper Co., 55 Or. 37.....	14

E

Eames v. Prentice, 8 Cush. (Mass.) 337.....	64
Edgeworth v. Wood, 58 N. J. Law, 463.....	315
Edmonson v. Phillips, 73 Mo. 57 (in Dis. Opn.).....	608
Edwards v. Perkins, 7 Or. 149.....	462
Edgar v. Golden, 36 Or. 448 (in Dis. Opn.).....	606
Eilers Music House v. Reine, 65 Or. 598.....	481, 618
Elder v. Rourke, 27 Or. 363.....	557
Elgin v. Snyder, 60 Or. 297.....	86
Ellenwood v. Marietta Chair Co., 158 U. S. 105.....	63, 70
Elliott v. Bozorth, 52 Or. 391, 395.....	451
Embury v. Connor, 3 N. Y. 511.....	72
Emmons v. Barton, 109 Cal. 662.....	87
Epstein v. State Ins. Co., 21 Or. 179.....	472
Erie R. Co. v. Reigherd, 166 Fed. 247.....	365
Esson v. Wattier, 25 Or. 7.....	210, 212

TABLE OF CASES CITED.

IV

	PAGE
Estes v. Desnoyes Shoe Co., 155 Mo. 577.....	94
Evanhoff v. State Industrial Acc. Com., 78 Or. 503.....	525, 525
Evans v. Foss, 194 Mass. 513.....	114
Evans v. Marvin, 76 Or. 540.....	261
Evarts v. Steger, 5 Or. 147.....	471
Ewin v. Independent School Dist., 10 Idaho, 102.....	626
Ex parte Joutsen, 154 Cal. 540.....	325

F

Fairchild v. Board of Education, 107 Cal. 92.....	629, 637, 639
Farris v. Strong, 24 Colo. 107.....	95
Feldman v. McGuire, 34 Or. 309.....	502
Fiore v. Ladd, 22 Or. 202.....	592
Fire Assn. v. Allesina, 45 Or. 154.....	5, 620
Fisher v. Union County, 43 Or. 223.....	276
Fisk v. Henarie, 13 Or. 156.....	146, 153, 157
First Nat. Bank of Chicago v. City of Elgin, 136 Ill. App. 453....	138
Flegel v. Dowling, 54 Or. 40.....	501
Fleming v. Lockwood, 36 Mont. 384.....	210, 212
Fletcher v. Rylands, L. R. 3 H. L. 330.....	211
Flint v. Phipps, 16 Or. 437.....	599
Foeller v. Heintz, 137 Wis. 169.....	248
Foley v. Crow, 37 Md. 51.....	578
Foster v. Schmeer, 15 Or. 363.....	471
Frayley v. Moban, 69 Or. 180, 186.....	229
Francis v. Bohart, 76 Or. 1.....	320
Freeman v. Thayer, 29 Me. 369.....	387
Fuller v. Chickopee Falls Mfg. Co., 16 Gray (Mass.), 46.....	211
Fuller v. Huff, 104 Fed. 141, 143.....	185
Furgeson v. Jones, 17 Or. 204.....	387

G

Galvin v. Brown & McCabe, 53 Or. 598.....	128, 128
Ganson v. Madigan, 15 Wis. 144.....	235
Gardner v. Sharp, 4 Wash. (C. C.) 609, 9 Fed. Cas. No. 5236.....	387
Gavazza v. Plummer, 53 Wash. 14, 42 L. E. A. (N. S.) 1, 3.....	432
Geiselman v. Schmidt, 106 Md. 580.....	315
Geldard v. Marshall, 43 Or. 438.....	128
Gibbs v. Insurance Co., 63 N. Y. 114.....	419
Gill v. Columbia Contract Co., 70 Or. 278 (in Dis. Opn.).....	608
Gips v. Coffinberry, 39 Or. 414.....	481, 618
Glenn v. Savage, 14 Or. 567.....	27
Gold Bridge Min. Co. v. Tallmadge, 44 Or. 34.....	236
Goodwin v. Horne, 60 N. H. 485.....	95
Goodyear v. School Dist., 17 Or. 517.....	629
Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 602.....	187
Gordon v. San Diego, 101 Cal. 522.....	387
Graham v. Coos Bay R. & N. Co., 71 Or. 393.....	415
Grant v. Oregon Navigation Co., 49 Or. 324.....	7
Graves v. Spier, 58 Barb. (N. Y.) 349.....	86, 87
Great Northern Ry. Co. v. O'Connor, 232 U. S. 508.....	33
Grover v. Hawthorne, 62 Or. 77.....	451, 452
Gruber v. Baker, 20 Nev. 453.....	86, 88
Guden v. Dike, 71 App. Div. 422.....	630, 636, 641

H	PAGE
Habersham v. Sears, 11 Or. 431.....	625
Hagehn v. Wacks, 61 Minn. 214, 216.....	155, 156
Haggerty v. Shedd, 75 N. H. 393.....	630
Haight v. Hayt, 19 N. Y. 465.....	87
Hailparn v. Joy S. S. Co., 50 Misc. Rep. 566.....	35
Haines v. City of Forest Grove, 54 Or. 443.....	539
Haines v. Einwachter, 55 Atl. (N. J. Ch.) 38.....	115
Hall v. Dunn, 52 Or. 475.....	619
Hall Moody Institute v. Copass, 69 S. W. (Tenn.) 327.....	629
Hamilton v. Blair, 23 Or. 64.....	219
Hamilton v. Brown, 161 U. S. 256.....	179
Hammer v. Campbell's Gas Burner Co., 74 Or. 126.....	331, 615
Hammer v. Downing, 41 Or. 234.....	324
Hannah v. Shirley, 7 Or. 115.....	236
Hanthorn v. Oliver, 32 Or. 57.....	442
Harrington v. La Rocque, 13 Or. 344.....	262
Harrington v. Rutherford, 38 Fla. 321.....	94
Harrison v. Birrell, 58 Or. 410.....	641
Harrison v. Pacific Ry. & Nav. Co., 72 Or. 553.....	289
Harvey v. Southern Pac. Co., 46 Or. 505.....	420
Hawkins v. Blakeley, 220 Fed. 378, 381.....	518
Hayes v. Adams Express Co., 74 N. J. Law, 537.....	35
Hempstead v. Easton, 33 Mo. 142.....	387
Henderson v. Lemke, 60 Or. 363.....	149
Herbert v. Southern Pacific Co., 121 Cal. 227.....	290
Hill v. Adams Express Co., 77 N. J. Law, 19.....	34, 36
Hill v. Cooper, 6 Or. 181.....	5, 620
Hill v. Nelson, 70 N. J. Law, 376.....	65
Hillman v. Young, 64 Or. 73.....	257
Hindman v. Edgar, 24 Or. 581 (in Dis. Opn.).....	606
Hirschfeld v. McCullagh, 64 Or. 502.....	207, 207
Hoadley v. McLaine, 10 Bing. 482.....	147
Hoag v. Washington-Oregon Corp., 75 Or. 588.....	595, 601
Hochfeld v. Portland, 72 Or. 190.....	276
Hodsen v. Hodsen, 69 Minn. 486.....	95
Hoffmire v. Martin, 29 Or. 240.....	599
Holmes v. Cole, 51 Or. 483.....	276
Hooper v. Wells Fargo & Co., 27 Cal. 11.....	38
Horne v. Chester School Dist., 75 N. H. 411.....	628
House v. Fowle, 22 Or. 303.....	261
Houston v. National etc. Loan Assn., 80 Miss. 31.....	87
Howard v. Tettelbaum, 61 Or. 144.....	472
Howd v. Breckenridge, 97 Mich. 65.....	86, 87
Howe v. Willson, 1 Denio (N. Y.), 181.....	64
Howell v. Big Horn Basin Colonization Co., 14 Wyo. 14.....	212
Huber v. Gugenheim, 89 Fed. 598.....	95
Huddleston v. Eugene, 34 Or. 343.....	334
Hughay v. Smith, 65 Or. 323.....	471, 472
Huntington v. Attrill, 146 U. S. 657, 659, 670.....	64
Hygeia Distilled Water Co. v. Consolidated Ice Co., 144 Fed. 139..	187
Hyland v. Hyland, 19 Or. 51.....	472

I

Illinois Steel Co. v. Ryska, 200 Ill. 280, 285.....	132
Ingerman v. State, 128 Ind. 225.....	550

TABLE OF CASES CITED.

xvii

	PAGE
Ingersoll v. Bostwick, 22 N. Y. 425.....	566
In re Birmingham, 15 Eng. Rul. Cas. 285.....	114
In re Cooper, 93 N. Y. 507.....	72
In re Noon's Estate, 49 Or. 286.....	259
In re North Pac. Presbyterian Bd. of Missions v. Ah Won, 18 Or. 339.....	395
In re Smith's Estate, 43 Or. 595.....	262
In re White River Bank, 23 Vt. 478.....	550
In re Willow Creek, 74 Or. 592, 615.....504, 505, 515, 515,	523
International Silver Co. v. William H. Rogers Corp., 2 Ann. Cas. 407, 415.....	183
Ireland v. City of Rochester, 51 Barb. (N. Y.) 414.....	172
Ivancovich v. Stern, 14 Nev. 341.....	95

J

Jackson v. Stearns, 48 Or. 25.....	620
Jackson v. Wheeling R. R. Co., 65 W. Va. 415.....	128
James Higgins Co. v. Torvick, 55 Or. 274.....	494
Jameson v. Board of Education, 74 W. Va. 386.....626, 629,	637
Jenkins v. Hooper Irr. Co., 13 Utah, 100.....	212
John P. Starkey Co. v. City of Portland, 58 Or. 353.....	334
Johnson v. Portland Stone Co., 40 Or. 440.....	128
Johnson v. Seaborg, 69 Or. 27.....	207
Johnston v. Letson, 3 Ariz. 344.....	553
Johnston v. Wadsworth, 24 Or. 494.....147, 149,	157
Jones v. Cooper, 97 Iowa, 735.....	364
Jones v. Hill, 62 Or. 53.....344,	348

K

Kabat v. Moore, 48 Or. 195.....	641
Kansas P. Ry. Co. v. Commissioners, 16 Kan. 594.....	654
Karr v. N. Y. J. F. Co., 78 N. J. Law, 198.....	65
Keady v. United Rys. Co., 57 Or. 325.....	323
Kelly v. Matlock, 85 Cal. 122.....	579
Kennedy v. Board of Education, 82 Cal. 483.....629, 637,	641
Kiernan v. Portland, 57 Or. 454, 467.....	269
Kimball v. Stanton, 4 Fed. 325 (in Dis. Opn.).....	609
King v. Miles City Irr. Ditch Co., 16 Mont. 463.....	212
King v. Voos, 14 Or. 91.....526,	530
Kiser v. Holladay, 29 Or. 338.....146, 148,	156
Kleinsorge v. Rohse, 25 Or. 51.....	472
Kneff v. Sanford, 63 Wash. 503.....	314
Knust v. Bullock, 59 Wash. 141.....314,	315
Kramer v. Wilson, 49 Or. 333, 337, 338, 341.....451,	580
Krebs Hop Co. v. Livesley, 55 Or. 227.....	493
Kunts v. Tonnele, 80 N. J. Eq. 373.....	593

L

Lacey v. Oregon R. & N. Co., 63 Or. 596.....	37
Ladd & Tilton v. Mason, 10 Or. 308.....	494
La Follett v. Mitchell, 42 Or. 465.....	617
Lane v. Wentworth, 69 Or. 242, 245.....	219
Langley v. Rodriguez, 122 Cal. 580.....	95
Langworthy v. Owen, 116 Minn. 342.....314,	342

	PAGE
Lankin v. Terwilliger, 22 Or. 97.....	354
Laurey v. Sterling, 41 Or. 518.....	200
Lawrence v. Gayetty, 78 Cal. 126.....	95
Leasure v. Forquer, 27 Or. 334.....	43, 82
Leavengood v. McGee, 50 Or. 233.....	38, 82, 478
Leaver v. Gorman, 78 N. J. Eq. 129.....	113
Lee v. Tillotson, 24 Wend. 337.....	72
Lewis v. Clark, 66 Or. 461.....	324
Lewis v. Coulter, 10 Ohio St. 451 (in Dis. Opn.).....	609
Lewis v. Lewis, 5 Or. 169.....	471
Lewy v. Wilkinson, 135 La. 105.....	432
Libby v. Oleott, 66 Or. 124.....	523
Lillienthal v. Caravita, 15 Or. 339.....	219
Lintner v. Wiles, 70 Or. 362.....	600
Lisonbee v. Monroe Irr. Co., 18 Utah, 343.....	212
Little v. Chicago etc. Ry., 65 Minn. 48.....	65
Little v. Van Syckle, 115 Mich. 480.....	237
Livermore v. Stine, 43 Cal. 274.....	146, 157
Livesley v. Heise, 48 Or. 147.....	526, 530
Livesley v. Johnston, 45 Or. 30.....	5
Livingston v. Jefferson, 1 Brock. 203.....	63
Lloyd v. Kirkwood, 112 Ill. 329.....	398
Loewenberg v. Rosenthal, 18 Or. 178.....	330
Long v. Nute, 123 Mo. App. 204.....	312
Longfellow v. Huffman, 49 Or. 486.....	493
Longshore Printing Co. v. Howell, 26 Or. 527.....	276
Love v. Teter, 24 W. Va. 741.....	95
Lowman v. Sheets, 124 Ind. 416.....	155
Ludberg v. Barghoorn, 73 Wash. 476.....	312

Mo

McBee v. Springfield, 58 Or. 459.....	194
McCaleb v. Dreyfus, 156 Cal. 204.....	171
McCarty v. Boise City Canal Co., 2 Idaho (Hasb.), 245.....	212
McClain v. Hutton, 131 Cal. 132.....	202
McCormick v. West Duluth, 47 Minn. 272.....	654
McCoy v. Bayley, 8 Or. 196.....	471
McCoy v. Huntley, 53 Or. 229.....	442
McCourt v. Johns, 33 Or. 561, 569.....	578
McCully v. State, 102 Tenn. 509.....	630, 640
McElvain v. St. Louis & S. F. R. Co., 176 Mo. App. 379.....	32
McFarland v. Carlsbad Sanatorium Co., 68 Or. 530.....	473
McFarlane v. McFarlane, 45 Or. 362.....	442
McGonigle v. Atchison, 33 Kan. 726.....	72
McGowan v. Luffburrow, 82 Ga. 523.....	398
McKenna v. Fisk, 1 How. 241, 247.....	64, 64
McKeon v. Portland, 61 Or. 385.....	193, 272
McLeod v. Despain, 49 Or. 536.....	567, 578
McLeod v. Lloyd, 43 Or. 260.....	421
McMahan v. Whelan, 44 Or. 402.....	5, 620
McMahon v. Allen, 35 N. Y. 403.....	87
McMillan v. Batten, 52 Or. 218.....	82
McNichol v. Mercantile Agency, 74 Mo. 457.....	419

TABLE OF CASES CITED.

xix

	PAGE
MacArthur v. Magee, 114 Cal. 126.....	581
MacKenzie v. Childers, 59 L. J. Ch. Div. (N. S.) 188.....	114

M

Madigan v. Walsh, 22 Wis. 501.....	155
Manning v. Portland Shipbuilding Co., 52 Or. 101, 103.....	132
Mariner v. Chamberlain, 21 Wis. 253, 256.....	463
Marshall v. Hillsboro Garden Tracts, 78 Or. 89.....	99
Martell v. St. Francis Hotel Co., 16 Ann. Cas. 593, 596.....	183, 184
Martin Co. v. Martin & Wilkes Co., 75 N. J. Eq. 39, 50.....	184
Marx v. Schwartz, 14 Or. 177 (in Dis. Opn.).....	608
Marvin v. Yates, 26 Wash. 50.....	370
Massie v. Commonwealth, 93 Ky. 588.....	373
Mayhue v. Eugene, 56 Or. 110.....	536
Mead v. Pettigrew, 11 S. D. 529 (in Dis. Opn.).....	609
Meier v. Kelly, 20 Or. 86.....	472
Merriman v. McCormick Co., 86 Wis. 142.....	64
Mestier v. Chevalier Paving Co., 108 La. 562.....	482
Miles v. Hemenway, 59 Or. 318.....	451
Millen v. Pacific Bridge Co., 51 Or. 538, 555.....	132
Miller v. Head Camp, 45 Or. 192.....	324
Miller v. Imperial Water Co., 156 Cal. 27.....	284
Miller v. Portland, 62 Or. 26.....	167
Milling Co. v. Pennsylvania, 125 U. S. 181.....	419
Misner v. Knapp, 13 Or. 140.....	82
Missouri etc. Ry. Co. v. St. Clair, 21 Tex. Civ. App. 345.....	425
Mitchell v. Holman, 30 Or. 280.....	472
Moller v. Gottsch, 107 Iowa, 238.....	180
Monastes v. Catlin, 6 Or. 119.....	257
Monson Mfg. Co. v. Fuller, 15 Pick. (Mass.) 534.....	211
Montour v. Purdy, 11 Minn. 384 (in Dis. Opn.).....	608
Moody v. Belden, 60 Hun (N. Y.), 582 (in Dis. Opn.).....	609
Moon v. Matthews, 227 Pa. 488.....	312
Morrill v. Morrill, 20 Or. 96.....	617
Morris v. Mo. Pac. Ry. Co., 78 Tex. 17.....	65
Morse v. Whitcomb, 54 Or. 412.....	112
Morton v. Wessinger, 58 Or. 80.....	276
Mulligan v. Jordan, 50 N. J. Eq. 363.....	115
Multnomah L. Co. v. Weston Basket Co., 54 Or. 22.....	323
Murray v. La Grande, 76 Or. 598.....	537, 629

N

National Bank of Commerce v. Huntington, 129 Mass. 444.....	419
National Surety Co. v. Lumber Co., 67 Wash. 601.....	201
National Valley Bank v. Hancock, 100 Va. 101.....	87
Neil v. Tollman, 12 Or. 269.....	617
Nelson v. Hudson R. R. Co., 48 N. Y. 498.....	30
New York Coach & Auto Lamp Co. v. Brown, 82 Misc. Rep. 92 (in Dis. Opn.).....	609
Nichols v. Lee, 16 Colo. 147.....	262
Nichols v. Michael, 23 N. Y. 264.....	563
Noland v. Bull, 24 Or. 479.....	323
Norris v. Kohler, 41 N. Y. 42.....	315
Northern Indiana R. R. v. Michigan Central R. R., 15 How. 233, 242, 251.....	64
Northern Pac. Lbr. Co. v. Willamette Mill Co., 29 Or. 221.....	426

O		PAGE
Oberlin v. Oregon-W. R. & N. Co.,	71 Or. 177.....	132, 133
Oberstock v. United Rys. Co.,	68 Or. 197, 204.....	150
O'Hara v. Parker,	27 Or. 156.....	276
Ollschlager's Estate v. Widmer,	55 Or. 145.....	14
Olney School Dist. v. Christy,	81 Ill. App. 304.....	626
Olsen v. Silverton Lumber Co.,	67 Or. 167, 176.....	132
Oregon etc. R. Co. v. Jackson,	21 Or. 360.....	330
Orr v. Goodloe,	93 Va. 263.....	95
Osborn v. Ketchum,	25 Or. 352.....	472
Osmers v. Furey,	32 Mont. 581, 590.....	463
Owen v. Jones,	68 Or. 311.....	114

P		
Pacific Elevator Co. v. Portland,	65 Or. 349.....	7
Parker v. Larsen,	86 Cal. 236.....	211
Parker v. West Coast Packing Co.,	17 Or. 510.....	4
Patrick v. Colorado Smelting Co.,	20 Colo. 268.....	432
Patterson v. Patterson,	40 Or. 560.....	83
Paul v. School Dist.,	28 Vt. 575.....	629
Payne v. Hallgarth,	33 Or. 430.....	599
Peirce v. American Express Co.,	210 Mass. 383.....	32
People v. Dulaney,	96 Ill. 503.....	550
People v. Healy,	128 Ill. 9.....	94
People v. Thompson,	94 N. Y. 451, 452.....	630, 641
People ex rel. v. Board,	43 Hun (N. Y.), 537.....	629
People ex rel. v. Board of Education,	82 Misc. Rep. 684.....	
628, 629, 637, 639,	641
People ex rel. v. Maxwell,	63 N. Y. Supp. 1098.....	626
People ex rel. v. Maxwell,	177 N. Y. 494.....	629, 637
People ex rel. v. Mayor of New York,	19 Hun, 441.....	630, 641
People ex rel. Peck v. Buffalo State Asylum,	8 N. Y. Supp. 396..	651
People ex rel. v. Wallace,	70 Ill. 680.....	523
Perine Contracting Co. v. City of Pasadena,	116 Cal. 6, 9.....	170
Perkins v. Lougee,	6 Neb. 220.....	95
Piedmont Land Improvement Co. v. Piedmont F. & M. Co.,	96 Ala. 389.....	95
Pierce v. Clarke,	71 Minn. 121.....	155
Pierson v. Fisher,	48 Or. 223.....	599
Pixley v. Clark,	35 N. Y. 520.....	212
Portland Nat. Bank v. Scott,	20 Or. 421 (in Dis. Opn.).....	606
Precious Blood Society v. Elsythe,	102 Tenn. 40.....	86
Pressed Steel Car Co. v. Herath,	207 Ill. 576, 580.....	131
Price v. The Boot Shop,	75 Or. 343.....	229
Proctor v. Jeffrey,	76 Or. 151.....	321
Provident Inst. v. Jersey City,	113 U. S. 506.....	383
Pry v. Hannibal etc. Ry. Co.,	73 Mo. 123 (in Dis. Opn.).....	608
Pugh v. Spicknall,	43 Or. 489.....	298, 342
Purdy v. Sherman,	74 Wash. 309.....	312, 314
Puritan Mfg. Co. v. Westermire,	47 Or. 557.....	237

R

Randall v. Fay,	158 Mich. 630.....	236
Raymond v. Flavel,	27 Or. 219, 237.....	451, 451, 593
Reagan v. Hadley,	57 Ind. 509.....	95

TABLE OF CASES CITED.

xxi

	PAGE
Reddaway v. Bunham, [1896] App. Cas. 199.....	186
Regis v. H. A. Jaynes & Co., 185 Mass. 458.....	187
Reid v. Alaska Packing Co., 47 Or. 215.....	110
Reilly v. Cullen, 159 Mo. 322.....	451
Richardson v. Dunlap, 26 Or. 270.....	323
Richardson v. Portland Ry., L. & P. Co., 70 Or. 330.....	291
Riggs v. Grants Pass, 66 Or. 266, 271.....	271
Riley v. Pearson, 21 Or. 15.....	431
Rivers v. Mitchell, 57 Iowa, 193.....	395
Roberts v. Templeton, 48 Or. 65.....	296
Rogers v. Virginia-Carolina Chemical Co., 149 Fed. 1.....	95
Ruckman v. Imbler Lbr. Co., 42 Or. 231 (in Dis. Opn.).....	603
Ruckman v. Union Ry. Co., 45 Or. 578.....	618
Rugenstein v. Ottenheimer, 70 Or. 600.....	374
Rumble v. Cummings, 52 Or. 203.....	110
Russell v. Erie R. R. Co., 70 N. J. Law 808.....	37
Russell v. Lewis, 3 Or. 380.....	257
Russia Cement Co. v. Le Page, 147 Mass. 206.....	183
Rutenic v. Hamaker, 40 Or. 444.....	258
Ryan v. Miller, 236 Mo. 496.....	88

S

Saltzman v. Sunset Telephone & Telegraph Co., 125 Cal. 501....	370
Sanborn v. Fitzpatrick, 51 Or. 459.....	11
Saxlehner v. Sigel-Cooper Co., 179 U. S. 42.....	188
Schade v. Muller, 75 Or. 225.....	557
Schaedler v. Columbia Contract Co., 67 Or. 412.....	654
Schlusser v. Great Northern Ry. Co., 20 N. D. 406.....	35
Schneider v. Sears, 13 Or. 69, 74.....	228
Schoellhamer v. Rometsch, 26 Or. 394.....	83
Scholl v. Belcher, 63 Or. 310.....	291
School Directors v. Wright, 43 Ill. App. 270.....	629
School Dist. v. Schuck, 49 Colo. 526.....	628
School Dist. No. 2 v. Lambert, 28 Or. 209.....	629
School District v. Holden, 78 Or. 267.....	192
School District v. Palmer, 41 Or. 485.....	193
School District No. 48 v. School District No. 115, 60 Or. 38.....	269
Schubel v. Olcott, 60 Or. 503.....	194
Schulte v. Holliday, 54 Mich. 73.....	315
Scott v. Walton, 32 Or. 460.....	86, 88
Scofield v. Stoddard, 58 Vt. 290.....	146, 157
Seaman v. Korhler, 122 N. Y. 646.....	315
Sellwood v. Henneman, 36 Or. 575.....	5, 472
Sentenis v. Ladew, 140 N. Y. 463.....	71, 73
Sharon v. Terry, 1 L. E. A. 572, 573.....	398
Sherman v. Glick, 71 Or. 451.....	43
Shields v. Orr Extension Ditch Co., 23 Nev. 349.....	211
Schmitt v. Day, 27 Or. 110.....	416
Simon v. Northup, 27 Or. 487, 505.....	522, 654
Slate's Estate, 40 Or. 349.....	257
Smith v. Algona Lumber Co., 73 Or. 1.....	321
Smith v. Interior Warehouse Co., 51 Or. 578.....	472
Smith v. Kelly, 24 Or. 464, 475.....	629
Smith v. National Surety Co., 77 Or. 17.....	83
Smith v. Southern Ry. Co., 136 Ky. 162.....	65

	PAGE
Smith v. Vose Piano Co., 194 Mass. 193.....	236
Smith v. Whiting, 55 Or. 393.....	257
Sorenson v. Smith, 65 Or. 78.....	146, 153, 156, 156
Southern Oregon Co. v. Coos County, 30 Or. 250.....	276
South Portland Land Co. v. Munger, 36 Or. 457.....	4, 619
Spaulding Log. Co. v. Independence Imp. Co., 42 Or. 397.....	654
Spaur v. McBee, 19 Or. 76.....	620
Specht v. Allen, 12 Or. 117.....	82
Sperry v. Stennick, 64 Or. 96.....	86, 86, 87
Spionskofsky v. Minto, 62 Or. 560.....	276
Sprague v. Jessup, 48 Or. 211.....	298, 341
Squire v. New York Cent. R. R. Co., 98 Mass. 239.....	32
Stalker v. Stalker, 78 Or. 291.....	342, 342
Stansbury v. White, 121 Cal. 433.....	170
Stark v. Stark, 7 Or. 500.....	620
State v. Bates, 96 Minn. 110.....	654
State v. Brown, 5 Or. 119.....	180
State v. Cochran, 55 Or. 157, 180.....	522
State v. Common Council, 53 Minn. 238.....	630, 640
State v. Dalles City, 72 Or. 337.....	539
State v. Dunn, 53 Or. 304.....	395
State v. Eberhardt, 14 Neb. 201.....	550
State v. Eisen, 53 Or. 297.....	395
State v. Engle, 21 N. J. Law, 347.....	179
State v. Town of Guttenberg, 38 N. J. Law, 419.....	171
State v. Hembree, 54 Or. 463.....	600
State v. Holliday, 8 N. J. Law, 205.....	651
State v. Humphrey, 63 Or. 540.....	289
State v. Jersey City, 58 N. J. Law, 144.....	171
State v. Jones, 18 Or. 261.....	314
State v. Kline, 50 Or. 426.....	323
State v. Lem Woon, 57 Or. 482.....	600
State v. Leonard, 73 Or. 451.....	599
State v. Levy, 76 Or. 63.....	654
State v. Manhattan Rubber Co., 149 Mo. 181.....	198
State v. Martin, 54 Or. 403.....	323
State v. McKinmore, 8 Or. 207.....	11
State v. Norfolk etc. R. Co., 152 N. C. 785.....	461
State v. Orange, 60 N. J. Law, 111.....	656
State v. Perry, 77 Or. 453.....	654
State v. Pomeroy, 30 Or. 16.....	313
State v. Sunset Tel. Co., 30 Wash. 676.....	550
State Bank v. Casaccia, 103 Cal. 641.....	581
State Bank of Indiana v. Gates, 114 Iowa, 323.....	95
State ex rel. v. Bare, 60 W. Va. 483.....	549
State ex rel. v. Board of Education, 19 Wash. 8.....	373
State ex rel. v. Board of Education, 18 N. M. 183.....	641
State ex rel. v. Gilbert, 66 Or. 434.....	194, 271
State ex rel. v. Metschan, 32 Or. 372.....	513
State ex rel. v. Portland, 65 Or. 273.....	194
State ex rel. v. Port of Tillamook, 62 Or. 332.....	270, 272
State ex rel. v. Smith, 49 Neb. 755.....	625
State ex rel. v. Wallbridge, 69 Mo. App. 657, 669.....	630
State ex rel. v. Williams, 45 Or. 314.....	276
Stearns v. Wollenberg, 51 Or. 88, 92.....	613, 620

TABLE OF CASES CITED.

xxiii

	PAGE
Stein v. Phillips, 47 Or. 545.....	472
Stephens v. Murton, 6 Or. 193.....	471
Stewart v. Portland Ry., L. & P. Co., 58 Or. 377.....	290
Stickel v. United States Express Co., 85 N. J. Law, 285.....	35
Stoddard v. Nelson, 17 Or. 417 (in Dis. Opn.).....	608
Stone v. United States, 167 U. S. 178.....	72
Stoney Creek v. Smalley, 111 Mich. 321.....	593
Stoppenbach v. Multnomah County, 71 Or. 493.....	629
Straight v. Wight, 60 Minn. 515.....	150
Sutherland v. Bloomer, 50 Or. 398 (in Dis. Opn.).....	14, 607
Sutherland v. Bloomer, 50 Or. 398.....	14, 163
Swank v. Swank, 37 Or. 437.....	599
Sylvester v. Jerome, 19 Colo. 128.....	211

T

Tallmadge v. Hooper, 37 Or. 503 (in Dis. Opn.).....	608
Taylor v. Allen, 40 Minn. 433, 434.....	156
Taylor v. Peterson, 76 Or. 77.....	154
Taylor v. Taylor, 54 Or. 560, 568.....	150
Thayer v. Brooks, 17 Ohio, 489, 492.....	64
Thayer v. Thayer, 69 Or. 140.....	342
The Victorian, 24 Or. 121.....	219
Thomas v. Placerville etc. Co., 65 Cal. 600.....	417
Thompson v. Gibbs, 97 Tenn. 489.....	629, 637, 639
Thornton v. Krimble, 28 Or. 271.....	472
Thurber v. McMinnville, 63 Or. 410.....	272
Titus v. Bradford, 136 Pa. 618.....	128
Tonseth v. Larsen, 69 Or. 387.....	296
Touchstone v. Staggs, 39 S. W. (Tex. Civ. App.) 189.....	95
Traer v. Clews, 115 U. S. 528.....	87
Trickey v. Clark, 50 Or. 516.....	150
Trowbridge v. Wetherbee, 11 Allen (Mass.), 361.....	155
Troxler v. New Era Bldg. Co., 137 N. C. 51.....	95
Tufts v. Matthews, 10 Fed. 611.....	86
Turney v. Bridgeport, 55 Conn. 412.....	437
Tustin v. Gaunt, 4 Or. 305.....	257

U

Ulster County Savings Inst. v. Young, 161 N. Y. 23.....	200, 201
United States v. American Surety Co., 200 U. S. 197.....	201

V

Van De Wiele v. Garbade, 60 Or. 585.....	86
Vanyi v. Portland Flouring Mills Co., 63 Or. 520, 530.....	132
Vaughn v. Smith, 34 Or. 54.....	86
Viano v. Baccigalupo, 183 Mass. 160.....	187
Voorhees v. Geiser-Hendryx Inv. Co., 52 Or. 602, 605.....	442

W

Waggy v. Scott, 29 Or. 386, 388.....	433
Wagonblast v. Whitney, 12 Or. 83.....	341, 348
Walker v. Goldsmith, 14 Or. 125, 143.....	259
Walter Baker & Co. v. Sanders, 80 Fed. 889.....	184
Watson v. Noonday Mining Co., 37 Or. 288.....	219
Webb v. Wheeler, 80 Neb. 438.....	334

	PAGE
Weber v. Doust, 84 Wash. 330, 333.....	395
Weidert v. State Ins. Co., 19 Or. 261 (in Dis. Opn.).....	608
Weidner v. Rankin, 26 Ohio St. 522.....	65
Weishaar v. Pendleton, 73 Or. 190.....	83
West v. Eley, 39 Or. 461.....	557
West v. Kelly's Exrs., 19 Ala. 353 (in Dis. Opn.).....	604
West v. Washington Ry. Co., 49 Or. 436.....	341
White v. Johnson, 27 Or. 282, 297.....	228
White v. Ladd, 41 Or. 324.....	618
Whiteaker v. Bell, 25 Or. 490.....	261
Whitney v. Bissell, 75 Or. 28.....	86
Willard v. Chicago & N. R. R. Co., 150 Wis. 234.....	32
Williams v. Breedon, 1 Bos. & P. 329.....	64
Williams v. Mt. Hood Ry. Co., 57 Or. 251 (in Dis. Opn.).....	608
Willis v. Holmes, 28 Or. 265.....	163
Wilson v. McCarthy, 66 Or. 498.....	114
Wilson v. New Bedford, 108 Mass. 261.....	211
Wilson v. Wilson, 26 Or. 251 (in Dis. Opn.).....	606
Wilson S. M. Co. v. Schnell, 20 Minn. 40.....	156
Witt v. Cuenod, 9 N. M. 143.....	95
Wollenberg v. Rose, 41 Or. 314.....	5, 619
Women's Catholic Order of Foresters v. Condon, 84 Ill. App. 564..	550
Wood v. Fisk, 45 Or. 276.....	5
Woodland v. Portneuf-Marsh Valley Irr. Co., 26 Idaho, 789.....	210
Woods v. Town of Prineville, 19 Or. 108, 110.....	431
Wren v. Indianapolis, 96 Ind. 206.....	651
Wright & Jones v. Edwards, 10 Or. 298.....	255, 258, 259

Y

Yuen Suey v. Fleshman, 65 Or. 606.....	463, 618
Young v. Cople, 52 Ill. App. 547.....	364
Youngstown v. Moore, 30 Ohio St. 133.....	65

Z

Zabriskie v. Smith, 13 N. Y. 322.....	86
Zeuske v. Zeuske, 55 Or. 65.....	5
Zeuske v. Zeuske, 62 Or. 46.....	342

OREGON DECISIONS.

Applied, Approved, Cited, Distinguished, Followed and Overruled in
this Volume.

A	PAGE
Aeeme Dairy Co. v. Astoria, 49 Or. 520, cited.....	194
Adams v. Brosius, 69 Or. 513, approved.....	363
Allen v. Ayer, 26 Or. 589, cited.....	599
Allen v. Leavens, 26 Or. 164, cited.....	323
Altona v. Dabney, 37 Or. 334, 336, cited.....	228
American Contract Co. v. Bullen Bridge Co., 29 Or. 549, cited (in Dis. Opn.).....	604
Anderson v. Adams, 43 Or. 621, applied.....	473
Applegate v. Dowell, 15 Or. 513, 516, cited.....	617

B	
Bade v. Hibberd, 50 Or. 501, cited.....	83
Baker v. Seaward, 63 Or. 350, approved, 27, applied.....	110
Barr v. Warner, 38 Or. 109, 111, applied.....	228
Barrett v. Failing, 8 Or. 152, cited.....	617
Barrett v. Schleich, 37 Or. 613, cited.....	298, 342
Barton v. School Dist., 77 Or. 30, cited.....	629
Baxter v. Davis, 58 Or. 109, cited.....	629
Beamish v. Noon, 76 Or. 415, followed.....	484, 495
Beard v. Beard, 66 Or. 526, cited.....	344
Belle v. Brown, 37 Or. 588, cited.....	617
Benson v. Keller, 37 Or. 120, cited.....	5, 619
Bickel v. Wessinger, 58 Or. 98, cited.....	452
Biggs v. McBride, 17 Or. 640, cited.....	629, 641
Black v. Irvin, 76 Or. 561, followed.....	355
Bower v. Bowser, 49 Or. 182, cited.....	472
Bowsman v. Anderson, 62 Or. 431, cited.....	620
Branch v. Albee, 71 Or. 188, followed.....	194
Brown v. Lewis, 50 Or. 358, 363, approved.....	442
Brown v. Oregon Lumber Co., 24 Or. 317, cited.....	128, 128
Brown v. Oregon-W. R. & N. Co., 63 Or. 409, cited.....	425
Burkhart v. Hart, 36 Or. 586, cited (in Dis. Opn.).....	608
Butts v. Purdy, 63 Or. 150, cited.....	174, 180

C	
Carroll v. Grande Ronde Elec. Co., 49 Or. 477, approved.....	442
Campbell's Gas Burner Co. v. Hammer, 78 Or. 612, cited.....	481
Case v. Noyes, 16 Or. 329, 333, cited.....	228
Caspary v. Portland, 19 Or. 496, cited.....	431
Cawfield v. Smyth, 69 Or. 41, cited.....	7
City of McMinnville v. Howenstine, 56 Or. 451, 456, cited.....	270
Clark v. Bundy, 29 Or. 190, cited.....	344
Clark v. Hindman, 46 Or. 67, cited.....	5, 620
Clemmensen v. Peterson, 35 Or. 48, cited.....	654
Cline v. Greenwood, 10 Or. 230, approved.....	522
Colgan v. Farmers' & Mechanics' Bank, 69 Or. 357, cited.....	618

	PAGE
Commercial Bank v. Sherman, 28 Or. 573, approved.....	207
Cook v. Howard, 59 Or. 372, approved.....	276
Cooke v. Portland, 69 Or. 572, distinguished.....	272
Cooper v. Hillsboro Garden Tracts, 78 Or. 74, followed.....	91
Copeland v. Tweedle, 61 Or. 303, distinguished 115, followed.....	593
Coquille Mill & Mercantile Co. v. Johnson, 52 Or. 547, approved..	4
Crawford v. School Dist., 68 Or. 388, cited.....	629
Crescy v. Joy, 40 Or. 28, cited.....	83
Crosby v. Portland Ry., L. & P. Co., 58 Or. 496, cited.....	150
Cunningham v. Klamath Lake Co., 54 Or. 13, cited.....	417, 417, 419
Currey v. Butcher, 37 Or. 380, cited.....	83

D

Dahms v. Sears, 13 Or. 47, cited.....	86
Davis v. Mitchell, 72 Or. 165, cited.....	83, 331
David v. Portland Water Committee, 14 Or. 109, 110, cited.....	193
De Lore v. Smith, 67 Or. 304, 309, approved.....	563
Dose v. Beatie, 62 Or. 308, cited.....	619
Drummond v. Miami Lbr. Co., 56 Or. 575, approved.....	276
Duester v. Alvin, 74 Or. 544, approved 113, 113, cited.....	114, 115
Dunham v. Monumental S. Min. Co., 9 Or. 41, cited.....	625
Durkheimer v. Copperopolis Copper Co., 55 Or. 37, cited.....	14

E

Edgar v. Golden, 36 Or. 448, cited (in Dis. Opa.).....	606
Edwards v. Perkins, 7 Or. 149, approved.....	462
Eilers Music House v. Reine, 65 Or. 598, cited.....	481, 618
Elder v. Rourke, 27 Or. 363, cited.....	557
Elgin v. Snyder, 60 Or. 297, cited.....	86
Elliott v. Bozorth, 52 Or. 391, 395, approved.....	451
Epstein v. State Ins. Co., 21 Or. 179, cited.....	472
Esson v. Wattier, 25 Or. 7, applied 210, cited.....	212
Evanhoff v. State Industrial Acc. Com., 78 Or. 503, cited 525, fol- lowed	525
Evans v. Marvin, 76 Or. 540, cited.....	261
Everts v. Steger, 5 Or. 147, cited.....	471

F

Feldman v. McGuire, 34 Or. 309, applied.....	502
Fiore v. Ladd, 22 Or. 202, followed.....	592
Fire Assn. v. Allesina, 45 Or. 154, cited.....	5, 620
Fisher v. Union County, 43 Or. 223, approved.....	276
Fisk v. Henarie, 13 Or. 156, cited 146, applied 153, cited.....	157
Flegel v. Dowling, 54 Or. 40, approved.....	501
Flint v. Phipps, 16 Or. 437, cited.....	599
Foster v. Schmeer, 15 Or. 363, cited.....	471
Fraley v. Hoban, 69 Or. 180, 186, cited.....	229
Francis v. Bohart, 76 Or. 1, cited.....	320
Furgeson v. Jones, 17 Or. 204, approved.....	387

G

Galvin v. Brown & McCabe, 53 Or. 598, cited.....	128, 128
Geldard v. Marshall, 43 Or. 438, cited.....	128
Gill v. Columbia Contract Co., 70 Or. 273, cited (in Dis. Opn.)...	608

	PAGE
Gius v. Coffinberry, 39 Or. 414, cited.....	481, 618
Glenn v. Savage, 14 Or. 567, cited.....	27
Gold Ridge Min. Co v. Tallmadge, 44 Or. 34, approved.....	236
Goodyear v. School Dist., 17 Or. 517, cited.....	629
Graham v. Coos Bay B. & N. Co., 71 Or. 393, approved.....	415
Grant v. Oregon Navigation Co., 49 Or. 324, applied.....	7
Grover v. Hawthorne, 62 Or. 77, approved 451, cited.....	452

H

Habersham v. Sears, 11 Or. 431, cited.....	625
Haines v. City of Forest Grove, 54 Or. 443, cited.....	539
Hall v. Dunn, 52 Or. 475, cited.....	619
Hamilton v. Blair, 23 Or. 64, cited.....	219
Hammer v. Campbell Gas Burner Co., 74 Or. 126, distinguished 331, cited.....	615
Hammer v. Downing, 41 Or. 234, followed.....	324
Hannah v. Shirley, 7 Or. 115, cited.....	236
Hanthorn v. Oliver, 32 Or. 57, cited.....	442
Harrington v. La Rocque, 13 Or. 344, cited.....	262
Harrison v. Birrell, 58 Or. 410, cited.....	641
Harrison v. Pacific Ry. & Nav. Co., 72 Or. 553, approved.....	289
Harvey v. Southern Pac. Co., 46 Or. 505, approved.....	420
Henderson v. Lemke, 60 Or. 363, cited.....	149
Hill v. Cooper, 6 Or. 181, cited.....	5, 620
Hillman v. Young, 64 Or. 73, cited.....	257
Hindman v. Edgar, 24 Or. 581 (in Dis. Opn.) cited.....	606
Hirschfeld v. McCullagh, 64 Or. 502, approved.....	207, 207
Hoag v. Washington-Oregon Corp., 75 Or. 588, cited.....	595, 601
Hochfeld v. Portland, 72 Or. 190, approved.....	276
Hoffmire v. Martin, 29 Or. 240, cited.....	599
Holmes v. Cole, 51 Or. 483, approved.....	276
House v. Fowle, 22 Or. 303, approved.....	261
Howard v. Tettelbaum, 61 Or. 144, cited.....	472
Huddleston v. Eugene, 34 Or. 343, cited.....	334
Hughey v. Smith, 65 Or. 323, approved.....	471, 472
Hyland v. Hyland, 19 Or. 51, cited.....	472

I

In re Noon's Estate, 49 Or. 286, cited.....	259
In re North Pac. Presbyterian Bd. of Missions v. Ah Won, 18 Or. 339, cited.....	395
In re Smith's Estate, 43 Or. 595, cited.....	262
In re Willow Creek, 74 Or. 592, 615, approved 504, cited 505, 515, approved.....	515, 523

J

Jackson v. Stearns, 48 Or. 25, cited.....	620
James Higgins Co. v. Torvick, 55 Or. 274, approved.....	494
John P. Starkey Co. v. City of Portland, 58 Or. 353, cited.....	334
Johnson v. Portland Stone Co., 40 Or. 440, cited.....	128
Johnson v. Seaborg, 69 Or. 27, approved.....	207
Johnston v. Wadsworth, 24 Or. 494, applied 147, cited.....	149, 157
Jones v. Hill, 62 Or. 53, cited.....	344, 348

K**PAGE**

Kabat v. Moore, 48 Or. 195, cited.....	641
Keady v. United Rys. Co., 57 Or. 325, cited.....	323
Kiernan v. Portland, 57 Or. 454, 467, applied.....	269
King v. Voos, 14 Or. 91, followed.....	526, 530
Kiser v. Holladay, 29 Or. 338, cited.....	146, 148, 156
Kleinsorge v. Rohse, 25 Or. 51, cited.....	472
Kramer v. Wilson, 49 Or. 333, 337, 338, 341, approved.....	451, 580
Krebs Hop Co. v. Livesley, 55 Or. 227, cited.....	493

L

Lacey v. Oregon R. & N. Co., 63 Or. 596, approved.....	37
Ladd & Tilton v. Mason, 10 Or. 308, approved.....	494
La Follett v. Mitchell, 42 Or. 465, cited.....	617
Lane v. Wentworth, 69 Or. 242, 245, applied.....	219
Laukin v. Terwilliger, 22 Or. 97, cited.....	334
Laurey v. Sterling, 41 Or. 518, cited.....	260
Leasure v. Forquer, 27 Or. 334, cited.....	43, 82
Leavengood v. McGee, 50 Or. 233, applied 38, cited 82, applied...	473
Lewis v. Clark, 66 Or. 461, cited.....	324
Lewis v. Lewis, 5 Or. 159, cited.....	471
Libby v. Oleott, 66 Or. 124, approved.....	523
Lillienthal v. Caravita, 15 Or. 339, cited.....	219
Lintner v. Wiles, 70 Or. 362, cited.....	600
Livesley v. Heiss, 48 Or. 147, followed.....	526, 530
Livesley v. Johnston, 45 Or. 30, cited.....	5
Loewenberg v. Rosenthal, 18 Or. 178, cited.....	330
Longfellow v. Huffman, 49 Or. 486, cited.....	493
Longshore Printing Co. v. Howell, 26 Or. 527, approved.....	276

Mo

McBee v. Springfield, 58 Or. 459, cited.....	194
McCourt v. Johns, 33 Or. 561, 569, approved.....	578
McCoy v. Bayley, 8 Or. 196, cited.....	471
McCoy v. Huntley, 53 Or. 229, cited.....	442
McFarland v. Carlsbad Sanatorium Co., 68 Or. 530, cited.....	473
McFarland v. McFarlane, 45 Or. 362, cited.....	442
McLeod v. Bepain, 49 Or. 536, approved.....	567, 578
McLeod v. Lloyd, 43 Or. 260, cited.....	431
McKeon v. Portland, 61 Or. 385, cited 193, distinguished.....	272
McMahan v. Whelan, 44 Or. 402, cited.....	5, 620
McMillan v. Batten, 52 Or. 218, cited.....	82

M

Manning v. Portland Shipbuilding Co., 52 Or. 101, 103, cited.....	132
Marshall v. Hillsboro Garden Tracts, 78 Or. 89, approved.....	99
Marx v. Schwartz, 14 Or. 177, cited (in Dis. Opn.).....	608
Mayhue v. Eugene, 56 Or. 110, cited.....	536
Meier v. Kelly, 20 Or. 86, cited.....	472
Miles v. Hemenway, 59 Or. 318, approved.....	451
Millen v. Pacific Bridge Co., 51 Or. 538, 555, cited.....	132
Miller v. Head Camp, 45 Or. 192, cited.....	324
Miller v. Portland, 62 Or. 26, cited.....	167
Misner v. Knapp, 13 Or. 140, cited.....	82

	PAGE
Mitchell v. Holman, 30 Or. 280, cited.....	472
Monastes v. Catlin, 6 Or. 119, cited.....	257
Morrill v. Morrill, 20 Or. 96, cited.....	617
Morse v. Whitcomb, 54 Or. 412, distinguished.....	112
Morton v. Wessinger, 58 Or. 80, approved.....	276
Multnomah L. Co. v. Weston Basket Co., 54 Or. 22, cited.....	323
Murray v. La Grande, 76 Or. 598, approved 537, cited.....	629

N

Neil v. Tollman, 12 Or. 269, cited.....	617
Noland v. Bull, 24 Or. 479, cited.....	323
Northern Pac. Lbr. Co. v. Willamette Mill Co., 29 Or. 221, cited..	426

O

Oberlin v. Oregon-W. R. & N. Co., 71 Or. 177, cited.....	132, 133
Oberstock v. United Rys. Co., 68 Or. 197, 204, cited.....	150
O'Hara v. Parker, 27 Or. 156, approved.....	276
Ollschlager's Estate v. Widmer, 55 Or. 145, cited.....	14
Olsen v. Silverton Lumber Co., 67 Or. 167, 176, cited.....	132
Oregon etc. R. Co. v. Jackson, 21 Or. 360, cited.....	330
Osborn v. Ketchum, 25 Or. 352, cited.....	472
Owen v. Jones, 68 Or. 311, cited.....	114

P

Pacific Elevator Co. v. Portland, 65 Or. 349.....	7
Parker v. West Coast Packing Co., 17 Or. 510, cited.....	4
Patterson v. Patterson, 40 Or. 560, cited.....	83
Payne v. Hallgarth, 33 Or. 430, cited.....	599
Pierson v. Fisher, 48 Or. 223, cited.....	599
Portland Nat. Bank v. Scott, 20 Or. 421, cited (in Dis. Opn.)....	606
Price v. The Boot Shop, 75 Or. 343, cited.....	229
Proctor v. Jeffrey, 76 Or. 151, approved.....	321
Pugh v. Spicknall, 43 Or. 489, cited.....	298, 342
Puritan Mfg. Co. v. Westermire, 47 Or. 557, approved.....	237

R

Raymond v. Flavel, 27 Or. 219, 237, distinguished 451, 451, applied	593
Reid v. Alaska Packing Co., 47 Or. 215, cited.....	110
Richardson v. Dunlap, 26 Or. 270, cited.....	323
Richardson v. Portland Ry. L. & P. Co., 70 Or. 330, followed....	291
Riggs v. Grants Pass, 66 Or. 266, 271, applied.....	271
Riley v. Pearson, 21 Or. 15, cited.....	431
Roberts v. Templeton, 28 Or. 65, distinguished.....	296
Ruckman v. Imbler Lbr. Co., 42 Or. 231, cited (in Dis. Opn.)....	603
Ruckman v. Union Ry. Co., 45 Or. 578, cited.....	618
Rugenstein v. Ottenheimer, 70 Or. 600, cited.....	374
Rumble v. Cummings, 52 Or. 203, cited.....	110
Russell v. Lewis, 3 Or. 380, cited.....	257
Rutenic v. Hamaker, 40 Or. 444, approved.....	258

S

Sanborn v. Fitzpatrick, 51 Or. 459, cited.....	11
Schade v. Muller, 75 Or. 225, approved.....	557

	PAGE
Schaedler v. Columbia Contract Co., 67 Or. 412, cited.....	654
Schneider v. Sears, 13 Or. 69, 74, cited.....	228
Schoellhamer v. Rometsch, 26 Or. 394, cited.....	83
Scholl v. Belcher, 63 Or. 310, followed.....	291
School Dist. No. 2 v. Lambert, 28 Or. 209, cited.....	629
School District v. Holden, 78 Or. 267, cited.....	192
School District v. Palmer, 41 Or. 485, cited.....	193
School District No. 48 v. School District No. 115, 60 Or. 38, ap- plied	269
Schubel v. Olcott, 60 Or. 503, cited.....	194
Scott v. Walton, 32 Or. 460, cited.....	86, 88
Sellwood v. Henneman, 36 Or. 575, cited.....	5, 472
Sherman v. Glick, 71 Or. 451, cited.....	43
Shmitt v. Day, 27 Or. 110, cited.....	416
Simon v. Northup, 27 Or. 487, 505, approved 522, cited.....	654
Slate's Estate, 40 Or. 349, cited.....	257
Smith v. Algona Lumber Co., 73 Or. 1, cited.....	321
Smith v. Interior Warehouse Co., 51 Or. 578, cited.....	472
Smith v. Kelly, 24 Or. 464, 475, cited.....	629
Smith v. National Surety Co., 77 Or. 17, cited.....	83
Smith v. Whiting, 55 Or. 393, cited.....	257
Sorenson v. Smith, 65 Or. 78, cited 146, applied 153, cited....	156, 158
South Portland Land Co. v. Munger, 36 Or. 457, applied 4, cited..	619
Southern Oregon Co. v. Coos County, 30 Or. 250, approved.....	276
Spaulding Log. Co. v. Independence Imp. Co., 42 Or. 397, cited...	654
Spaur v. McBee, 19 Or. 76, cited.....	620
Specht v. Allen, 12 Or. 117, cited.....	82
Sperry v. Stennick, 64 Or. 96, cited.....	86, 86, 87
Splonskofsky v. Minto, 62 Or. 560, approved.....	276
Sprague v. Jessup, 48 Or. 211, cited.....	298, 341
Stalker v. Stalker, 78 Or. 291, cited.....	342, 342
Stark v. Stark, 7 Or. 500, cited.....	620
State v. Brown, 5 Or. 119, cited.....	180
State v. Cochran, 55 Or. 157, 180, approved.....	522
State v. Dalles City, 72 Or. 337, cited.....	539
State v. Dunn, 53 Or. 304, cited.....	395
State v. Eisen, 53 Or. 297, cited.....	395
State v. Hembree, 54 Or. 463, cited.....	600
State v. Humphrey, 63 Or. 540, approved.....	289
State v. Jones, 18 Or. 261, approved.....	314
State v. Kline, 50 Or. 426, cited.....	323
State v. Lem Woon, 57 Or. 482, cited.....	600
State v. Levy, 76 Or. 63, cited.....	654
State v. Leonard, 73 Or. 451, cited.....	599
State v. Martin, 54 Or. 403, cited.....	323
State v. McKinmore, 8 Or. 207, cited.....	11
State v. Perry, 77 Or. 453, cited.....	654
State v. Pomeroy, 30 Or. 16, cited.....	313
State ex rel. v. Gilbert, 66 Or. 434, cited 194, applied.....	271
State ex rel. v. Metschan, 32 Or. 372, cited.....	513
State ex rel. v. Portland, 65 Or. 273, cited.....	194
State ex rel. v. Port of Tillamook, 62 Or. 332, applied 270, dis- tinguished	272
State ex rel. v. Williams, 45 Or. 314, approved.....	276
Stearns v. Wollenberg, 51 Or. 88, 92, cited 613, applied.....	620

	PAGE
Stein v. Phillips, 47 Or. 545, cited.....	472
Stephens v. Murton, 6 Or 193, cited.....	471
Stewart v. Portland Ry., L. & P. Co., 58 Or. 377, followed.....	290
Stoddard v. Nelson, 17 Or. 417, cited (in Dis. Opn.).....	608
Stoppenback v. Multnomah County, 71 Or. 493, cited.....	629
Sutherland v. Bloomer, 50 Or. 398, cited (in Dis. Opn.).....	607
Sutherland v. Bloomer, 50 Or. 398, cited.....	14, 163
Swank v. Swank, 37 Or. 437, cited.....	599

T

Tallmadge v. Hooper, 37 Or. 503, cited (in Dis. Opn.).....	608
Taylor v. Peterson, 76 Or. 77, applied.....	154
Taylor v. Taylor, 54 Or. 560, 568, cited.....	150
Thayer v. Thayer, 69 Or. 140, cited.....	342
The Victorian, 24 Or. 121, cited.....	219
Thornton v. Krimble, 28 Or. 271, cited.....	472
Thurbur v. McMinnville, 63 Or. 410, distinguished.....	272
Tonseth v. Larsen, 69 Or. 387, distinguished.....	296
Trickey v. Clark, 50 Or. 516, cited.....	150
Tustin v. Gauny, 4 Or. 305, cited.....	257

V

Van De Wiele v. Garbade, 60 Or. 585, cited.....	86
Vanyi v. Portland Flouring Mills Co., 63 Or. 520, 530, cited.....	132
Vaughn v. Smith, 34 Or. 54, cited.....	86
Voorhees v. Geiser-Hendryx Inv. Co., 52 Or. 602, 605, cited.....	442

W

Waggy v. Scott, 29 Or. 386, 388, approved.....	433
Wagenblast v. Whitney, 12 Or. 83, cited.....	341, 348
Walker v. Goldsmith, 14 Or. 125, 143, cited.....	259
Watson v. Neonday Mining Co., 37 Or. 288, distinguished.....	219
Weidert v. State Ins. Co., 19 Or. 261, cited (in Dis. Opn.).....	608
Weishaar v. Pendleton, 73 Or. 190, cited.....	83
West v. Eley, 39 Or. 461, cited.....	557
West v. Washington Ry. Co., 49 Or. 436, cited.....	341
White v. Jehnson, 27 Or. 282, 297, cited.....	228
White v. Ladd, 41 Or. 324, cited.....	618
Whiteaker v. Bell, 25 Or. 490, approved.....	261
Whitney v. Bissell, 75 Or. 28, cited.....	86
Williams v. Mt. Hood Ry. Co., 57 Or. 251 (in Dis. Opn.), cited...	608
Willis v. Holmes, 28 Or. 265, approved.....	163
Wilson v. McCarthy, 66 Or. 498, cited.....	114
Wilson v. Wilson, 26 Or. 251, cited (in Dis. Opn.).....	606
Wollenberg v. Rose, 41 Or. 314, cited.....	5, 619
Wood v. Fisk, 45 Or. 276, cited.....	5
Woods v. Town of Prineville, 19 Or. 108, 110, applied.....	431
Wright & Jones v. Edwards, 10 Or. 298, cited and applied 255, distinguished 258, cited.....	259

Y

Yuen Suey v. Fleshman, 65 Or. 606, approved 463, cited.....	618
---	-----

Z

Zeuske v. Zeuske, 55 Or. 65, cited.....	5
Zeuske v. Zeuske, 62 Or. 46, cited.....	342

STATUTES OF OREGON.

Cited and Construed in this Volume.

LORD'S OREGON LAWS.	
SECTION	PAGE
42	53, 71
45, subd. 4	418, 418
72	54, 70
74	580
97	484, 495
103	439, 439, 441
172	17, 24
182	442
182, subd. 3	439, 443
184	439, 442
201	250, 261
283	558, 558, 562
298	220, 220, 226
300	227
300, subd. 3	221, 226
346	326, 326, 327, 328, 330, 335
390	620
401	568, 579
405	9, 14
422	568, 582
549	218
550	9, 11, 216, 218
551	9, 11, 551, 554
554	214, 215
555	301, 303
556	324, 552, 558
561	39, 46
604	534
605	533
710	338
713	100, 108, 109, 601, 605
727, subd. 4	338
732, subd. 2	338, 342, 344
756	399
771	250, 261
794	600
796	600
799, subd. 11	609
804	100, 110, 113
808	
100, 109, 113, 139, 140, 146, 152	
808, subd. 8	139, 141
868, subd. 4	298
936, subd. 5	249, 257
1135	249, 258
1185	338, 343
1253	249, 255, 263
1269	344
1304	338, 343
1305	338, 343
2385	39, 51

LORD'S OREGON LAWS (Continued).	
SECTION	PAGE
2393	336
2398	336
2442	250, 260
2449	250, 260
2457	325
2985	541, 547
2987	541, 548
3482	531, 538, 538
4021	267, 267, 268
4116	631
4194	188, 189, 191
4406	390, 396
4407	390, 396
4409	390, 397
4410	391, 397
4414	391, 397
4415	391, 397
4544	527
4549	526, 527, 530, 530
4550	526, 530
5046	409, 427
5899	158, 163
6266	195, 195
6314	541, 547
6319	541, 541, 547, 548
6726	204, 408, 416, 419
6727	202, 203, 204
6959	355, 360
7105	453, 462
7286	249, 260
7348	249, 260
7363	177
7364	177
7365	177
7369	178
7370	178
7374	179
7444	217
7445	375, 381
7447	376
HILL'S ANN. LAWS.	
310	324
B. & C. COMP.	
4042	7
5668-5672	382
REM. & BAL. CODE. (WASH.)	
3670	53, 53, 59, 60
3671	59
3679	53, 58

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.

	PAGE
Article I, Section 10	504, 517
Article III, Section 1.....	503, 504, 515, 516
Article IV, Section 1	643, 656
Article IV, Section 1a.....	189, 193, 267, 267, 268, 268
Article IV, Section 19	505, 523
Article IV, Section 20.....	643, 653, 654, 654
Article VII, Section 1.....	249, 256, 257, 504, 516
Article VII, Section 3.....	118, 129, 134, 137, 140, 150, 309, 314, 315
Article VII, Section 9	515
Article VII, Section 12	249, 256
Article VII, Section 13	249, 256
Article VIII, Section 3	272
Article IX, Section 7.....	504, 519 (in Dis. Opn. 524)
Article XI, Section 2	188, 190, 267, 268, 269, 271, 272, 531, 532, 534, 538, 538

CONSTITUTION OF THE UNITED STATES.

Cited in this Volume.

Fourteenth Amendment, Section 1.....	504, 517
--------------------------------------	----------

RULES OF THE SUPREME COURT.

Cited and Applied in this Volume.

Rule 6 (56 Or. 616, 117 Pac. ix).....	214, 215
Rule 7 (56 Or. 616, 117 Pac. ix).....	318, 320
Rule 18 (56 Or. 622, 117 Pac. xi).....	102, 439 449

CHARTERS OF CITIES.

Cited and Construed in this Volume.

LA GRANDE.

Birnie v. La Grande.....	531
--------------------------	-----

STATUTES OF THE UNITED STATES.

Considered in this Volume.

STATUTES AT LARGE.

1887, Act Feb. 4, c. 104, 24 Stat. 379	17, 26
1894, Act Aug. 13, c. 280, 28 Stat. 278	199

U. S. REVISED STATUTES.

Section 5352.....	292
-------------------	-----

STATUTES—Continued.

U. S. COMPILED STATUTES.

1913, Section 6923.....	200
-------------------------	-----

FEDERAL STATUTES ANNOTATED.

6 Fed. Stats. Ann. 125.....	199
-----------------------------	-----

SESSION LAWS.

Cited and Applied in this Volume.

Laws 1860, p. 64	520
Laws 1872, pp. 129, 130.....	7
Laws 1874, pp. 76, 77.....	7
Laws 1891, p. 76	381
Laws 1903, p. 256	195, 195
Laws 1907, p. 293	376, 382
Laws 1911, p. 7.....	140, 150, 257, 309, 504, 516
Laws 1911, p. 16.....	130, 407, 408, 409, 409, 415
Laws 1911, p. 85	629
Laws 1911, p. 180	355, 360
Laws 1911, p. 193	376, 382
Laws 1913, p. 59	196
Laws 1913, p. 66	548
Laws 1913, p. 69	
621, 622, 626, 629, 632, 634, 635, 635, 635, 636, 637, 639, 639, 639	
Laws 1913, p. 188.....	503, 503, 503, 504, 504
Laws 1913, pp. 299, 304.....	622, 630, 632, 634, 637, 637
Laws 1913, p. 458.....	540, 541, 541, 541, 542
Laws 1913, p. 617	9, 11
Laws 1913, p. 618	214, 215
Laws 1913, p. 656	321
Laws 1913, p. 663	
..... 642, 642, 642, 642, 643, 643, 647, 648, 649, 652, 652, 655, 656	
Laws 1913, p. 686	541
Laws 1915, pp. 52-55	189
Laws 1915, p. 54, § 2.....	188, 189, 189
Laws 1915, p. 177, § 1	390, 396
Laws 1915, p. 248	176
Laws 1915, p. 273	189, 194
Laws 1915, p. 537	
..... 642, 643, 643, 643, 648, 651, 652, 653, 653, 654, 654, 657, 657	
Laws 1915, p. 558	400, 402
Laws 1915, p. 564	403
Laws 1915, p. 564, § 20	406, 406
Laws 1915, p. 565	399
Laws 1915, p. 565, § 35, subd. 16	405
Laws 1915, p. 567, § 35	400, 403, 404
Laws 1915, p. 568, § 35, subd. 3	399, 406, 406
Laws 1915, p. 568, § 35, subd. 5	405

CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Argued October 8, reversed October 22, 1915.

FELLMAN v. TIDEWATER MILL CO.

(152 Pac. 268.)

Injunction—Jurisdiction—Adequate Remedy at Law—Title to Land.

1. Equity will take jurisdiction of a suit to prevent the defendant from constructing a log boom, by driving piles along the harbor line directly in front of tide-lands alleged to be owned by complainants, and thence across the lands, isolating them from the navigable channel, and preventing ingress and egress to complainants' other property, to their irreparable injury, and threatening to fill the boom with sawlogs, even though defendant denied the alleged ownership, since the ownership, as to which an action of ejectment might have afforded an adequate remedy at law, was not the only question involved, but was ancillary to other questions of access, etc.

[As to what is within the meaning of the law of irreparable injury, see note in 1 Am. St. Rep. 374.]

Navigable Waters—Log Boom—Pleading—Federal Authority.

2. Where defendant, while denying complainants' ownership, did not affirmatively plead title to the lands in question, and alleged that the boom was situated upon its own land and the waters of the river and bay, and was maintained under license from the federal government, without setting out the terms of such license, it could not be presumed that it empowered defendant to prevent the tide-water owner from access to navigable waters in front of his land.

Navigable Waters—State Tide-lands—Title—Low-water Mark.

3. Deeds conveying all the tide-lands in front of the lots mentioned therein extended the title thereunder to low-water mark, wherever that might be, then or afterward.

Navigable Waters—Tide-lands—Accretion.

4. The purchaser of tide-water lands, taking to low-water mark, acquires title to accretions gradually forming upon his original grant.

[As to acquisition of title to land under water by possession adverse to state, see note in Ann. Cas. 1912A, 702.]

From Lane: WILLIAM GALLOWAY, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

The plaintiffs, Joseph Fellman and Jesse J. Nicolle, complaining of the Tidewater Mill Company, the defendant corporation, allege that they are the owners of all tide-lands fronting and abutting upon lots 3 and 4 in section 26, and lot 7 in section 35, of township 18 south, range 12 west of Willamette Meridian, in Lane County, Oregon, except a tract of tide-land containing 15 acres, which exception is particularly described by metes and bounds. These tide-lands border on the Siuslaw River, a navigable stream used for the purpose of commerce and navigation. In effect the complaint charges that the defendant is constructing a log boom by driving piles at short intervals, commencing near its sawmill and following the harbor line at a depth of about 10 feet upstream and directly in front of the tide-lands of plaintiffs, and thence across the lands themselves, completely isolating them from the navigable channel, and preventing ingress to and egress from their other property, to their irreparable injury, and that the defendant threatens to continue the boom and to fill it with sawlogs.

The defendant denies everything in the complaint, except the allegation of its corporate existence. Answering affirmatively, it states in substance that it is operating a sawmill on Siuslaw Bay, and that it is necessary to maintain a boom in the river and bay to hold logs with which the mill is supplied. This allegation then follows:

“That the log boom belonging to defendant, and referred to in said complaint, is situate upon the lands of defendant and upon the waters of said Siuslaw

River and Bay, and where the same is situate upon the said Siuslaw River and Bay, the same is so maintained under license from the United States of America, duly made and issued by the said United States of America through its Department of War, to which is delegated the regulation of navigation upon the said waters, and that the said boom is so situate, so as not to interfere with or impede navigation upon said Siuslaw River and Bay, and does not in fact interfere with the navigation of said waters, and that plaintiffs do not own, occupy, or use the lands upon which said log boom is situated and maintained, and that plaintiffs are not engaged in navigation upon the said waters, and have no property which is used or is available for the purpose of navigation or commerce upon or adjacent to the said waters, and that the said log boom is lawfully used and maintained by said defendant, and is not an obstruction to commerce or navigation, and is so maintained, used, and operated in its said business lawfully.”

The reply admits the navigability of the river, but traverses the other allegations of the answer. We deem it unnecessary to consider some new matter which appears in the last pleading. The Circuit Court heard the testimony on the issues raised, and determined substantially that, because there was drawn in question the title of real property, of which the defendant was in actual possession, the legal remedy of ejectment was adequate, that therefore the court was without jurisdiction to try the case on the equity side, and so dismissed the suit. From this decree the plaintiffs appealed.

REVERSED.

For appellant there was a brief over the name of *Messrs. Williams & Bean*, with an oral argument by *Mr. John M. Williams*.

For respondent there was a brief over the names of *Messrs. Thompson & Hardy* and *Mr. Hollis S. Wilson*, with an oral argument by *Mr. Charles A. Hardy*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The ownership of the tide-lands mentioned in the complaint is not the only question involved. The issues affect also the right of access to the navigable stream. In *Coquille Mill & Mercantile Co. v. Johnson*, 52 Or. 547 (98 Pac. 132, 132 Am. St. Rep. 716), it was held that the right to operate a boom in a navigable stream adjacent to real property as a thing distinguished from appropriation and occupation of the soil under the water is an incorporeal hereditament, for the possession of which an action of ejectment will not lie—citing 15 Cyc. 16; *Parker v. West Coast Packing Co.*, 17 Or. 510 (21 Pac. 822, 5 L. R. A. 61). This feature of the case is peculiarly cognizable in equity, and serves as a leaven to leaven the whole lump of litigation, giving the chancery side of the court jurisdiction to hear and determine the entire controversy, although some features of it might be worked out at law. In a sense the title to the land is ancillary to the other question involved, when viewed from the standpoint of equity. As stated in *South Portland Land Co. v. Munger*, 36 Or. 457 (60 Pac. 5):

“The remedy at law to which the statute alludes must be plain, adequate, and complete, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. It is not enough that there is a remedy at law. * *
‘The remedy at law which defeats a suit in equity must be full, adequate, and complete. Anything less than

this will not be sufficient to deprive equity of jurisdiction.' ”

In support of this principle giving authority to courts in equity, although in some aspects of the litigation there might be some remedy at law, this precedent is quoted approvingly by this court in the following cases: *Sellwood v. Henneman*, 36 Or. 575 (60 Pac. 12); *Benson v. Keller*, 37 Or. 120 (60 Pac. 918); *Wollenberg v. Rose*, 41 Or. 314 (68 Pac. 804); *McMahan v. Whelan*, 44 Or. 402 (75 Pac. 715); *Livesley v. Johnston*, 45 Or. 30 (76 Pac. 946, 106 Am. St. Rep. 647, 65 L. R. A. 783); *Fire Assn. v. Allesina*, 45 Or. 154 (77 Pac. 123); *Wood v. Fisk*, 45 Or. 276 (77 Pac. 128, 738); *Clark v. Hindman*, 46 Or. 67 (79 Pac. 56); *Zeuske v. Zeuske*, 55 Or. 65 (103 Pac. 648, 105 Pac. 249, Ann. Cas. 1912A, 557). In *Hill v. Cooper*, 6 Or. 181, it was held that even by defending an action at law unsuccessfully the losing party was not deprived of his right to subsequently begin his suit in equity to maintain his rights which might be otherwise concluded by the judgment at law. If, therefore, as in that case, a defendant defeated in the law action may yet prosecute his suit in equity notwithstanding the law judgment, much more may he commence in equity in the first instance to wage his contention, when it involves relief which only chancery will award. It would be of little profit to the plaintiffs to bring ejectment for the tide-lands which they claim, and yet be cut off from access to navigable water by the boom of the defendant planted in front of them. We conclude that the issues involved in the pleadings are properly cognizable in equity.

2. The defendant does not affirmatively plead title in itself to the *locus in quo* described in the complaint. The plaintiffs point out that the boom is extended, not

only in the river in front of their premises, but also across their lands to the 15-acre tract, forming the exception in the description already mentioned. Referring to the excerpt from the answer quoted above, we find the defendant stating that the boom is situated upon its own land, and upon the waters of the river and bay, and where it is situated upon those waters it is maintained under license from the United States. The terms of the permit are not set out, and it is but a conclusion of law to say that the boom is maintained under that authority. We cannot presume that it empowered the defendant to prevent the shore owner from access to the navigable waters in front of his holdings.

Without pleading title in itself, the defendant essayed to prove that it was the owner of what is known as "Tide Island," above the premises described by the plaintiffs, and that this island by gradual accretion had been extended downstream and in front of the lands claimed by the plaintiffs. The muniments of title introduced by them without objection on the part of defendant show that by deeds of date August 26, 1887, and March 8, 1889, the State of Oregon, by what is now known as the state land board, conveyed to the plaintiffs' predecessor in interest all the tide-lands fronting or abutting upon lot 7 in section 35, and lots 3 and 4 in section 26, township 18 south, range 12 west of the Willamette Meridian. It is true that those conveyances state that the tide-land as it then existed contained a certain number of acres. The position taken by the defendant here is that the predecessor in interest of the plaintiffs took only to the precise metes and bounds described in the survey of the tide-lands as they then were, and that those limits were fixed and immovable, so that other tide-lands might afterward

come into existence between the lands then called tide-lands and the river. A further contention on the evidence is that by gradual accretion Tide Island was extended downstream in front of the lands originally conveyed by the state, as noted above, and hence cut off plaintiffs' holdings from access to the river.

3. In the first place, as regards the tide-lands, the deeds conveyed to the grantor of plaintiffs all the tide-land in front of the lots mentioned. This extended the holdings under those deeds to low-water mark, wherever the same might be then or afterward. Applying this principle, Mr. Justice EAKIN, in *Grant v. Oregon Navigation Co.*, 49 Or. 324 (90 Pac. 179, 1099), as quoted by Mr. Justice BEAN in *Pacific Elevator Co. v. Portland*, 65 Or. 349, 399 (133 Pac. 72, 82, 46 L. R. A. (N. S.) 363), said:

“By the legislative acts of 1872 * * and 1874 * * the upland owner was given the preference right to purchase the tide-land, and upon such purchase, if not already vested in another under Section 4042, B. & C. Comp., he thereby acquired also the exclusive wharfage right to deep water, and also all accretions to his tide-land and the right to fill up the shallows or flats, so long as he does not impede navigation or interfere with commerce over the same.”

4. The rule is that the purchaser of tide-land takes to the low-water mark, that afterward he is entitled to follow that line to the utmost of its recession, and that he acquires title to the accretions which gradually form upon his original grant: *Caulfield v. Smyth*, 69 Or. 41 (138 Pac. 227). The plaintiffs are therefore entitled to the accretions joining their land in front thereof to the present low-water line on the Siuslaw River, when considered as a pure addition by imperceptible degrees to that holding.

A careful reading of the testimony impresses us with the belief that the contention of the defendant that the accretion is part of Tide Island is not well founded. The evidence goes no further than to show that in former times there was a channel between Tide Island and the tide-lands included in the conveyances from the state, through which passage rowboats could be taken in any stage of water, but that now at low water all the lands in that vicinity are uncovered, including the bed of the channel. It is practically without dispute, however, that substantially along the east line of the premises claimed by the plaintiffs a depression exists, which some witnesses say contains water at all stages, and which those most favorable to the defendant admit has water in it at quarter tide. It seems clear to us that that depression is the small remainder of the former channel between the original tide-lands and Tide Island, showing that the accretions which extend from plaintiffs' grant to the present low-water mark are not part of Tide Island, but natural additions by imperceptible degrees to their holdings.

We conclude that as the suit involves the right of access to the navigable water, for which ejectment will not lie, a court of equity has jurisdiction, because the action of ejectment would not afford complete relief for the grievances of which the plaintiffs complain, although incidentally the title to the tide-lands is involved. We think, also, upon the merits of the case, the testimony shows that the accretions in front of and annexed to the lands of the plaintiffs cannot be attributed to an extension of Tide Island, but belong essentially to the original grant from the state to the predecessor of plaintiffs.

The decree of the Circuit Court is reversed and one here entered according to the prayer of the complaint.

REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON concur.

Motion to dismiss appeal filed July 12, conditionally allowed July 27, 1915.

On the merits argued October 19, modified October 22, 1915.

SUTTON v. SUTTON.

(150 Pac. 1025; 152 Pac. 271.)

Appeal and Error—Undertaking—Sufficiency.

1. Under Section 551, L. O. L., providing that the undertaking of the appellant shall be that appellant will pay all damages, costs and disbursements awarded against him, an undertaking, which limited the surety's liability to \$100 is insufficient.

Appeal and Error—Undertakings—Amendment.

2. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, so as to provide that, when a party in good faith gives due notice of an appeal, and thereafter omits through mistake to do anything, including the filing of an undertaking, the appellate court may permit an amendment, an appellant who in good faith tendered an undertaking which was insufficient should be allowed to amend and furnish the good undertaking.

Equity—Trial—Exclusion of Evidence.

3. Under Section 405, L. O. L., providing, relative to suits in equity that where evidence is offered and excluded, the party offering it shall be entitled to have it taken down in like manner as the testimony admitted, and that he shall be required to pay for taking it, unless the court on appeal holds it competent, where the court refused to hear evidence as to certain matters, but, when counsel stated that they had two witnesses who would not take over five minutes apiece, directed them to be called, and the party offering the testimony did not request permission to take any testimony over the ruling of the court, or offer to pay for the recording of such testimony, there was no error.

[As to mode of preserving for review oral evidence in equity case, see note in *Ann. Cas.* 1913A, 283.]

Divorce—Decree—Conformity to Pleadings and Proof.

4. In a suit for divorce the ownership of a photograph of a deceased child of the parties was not made an issue by the pleadings or

mentioned in the evidence, but just prior to the close of the trial the husband's attorney stated that the wife had two identical large photographs, one of which was the husband's property, and asked that the decree require her to turn one of them over to the husband. The wife's attorney admitted that the wife had possession of such photographs, and stated that he would advise her to turn one of them over to the husband, and that he did not deem it necessary to insert a provision in the decree. On the settlement of the findings and conclusions the wife's attorney stated that the wife refused to turn over either of the photographs to the husband. *Held*, that the court was without authority to provide in the decree that the wife should deliver one of such photographs to the husband, as, assuming that her attorney had a right to bind her by an admission, he made no admission as to the husband's ownership, and, moreover, ample notice of the wife's position was given before the formal decision and decree were entered.

Divorce—Alimony—Agreements of Parties—Effect.

5. In a divorce suit the husband, pursuant to an agreement, stipulated to transfer his personal property and convey his real estate to a trustee, who was empowered to sell it according to his own judgment, pay a mortgage thereon, satisfy certain debts of the husband, and deliver the balance, if any, to the wife. The mortgage was foreclosed, so that the trustee was practically shorn of his power, and the wife derived no benefit from the transfer to the trustee. *Held*, that she was not barred by the agreement from claiming alimony.

[As to power of court to modify decree for alimony based on agreements of parties, see note in *Ann. Cas.* 1912C, 446.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

This is a suit by Rosa B. Sutton against James N. Sutton for divorce, in which defendant filed a cross-complaint. From a decree in favor of defendant, plaintiff appeals. Respondent moves to dismiss appeal.

CONDITIONALLY ALLOWED.

Mr. Frederick H. Drake, for the motion.

Mr. H. E. Collier, contra.

In Banc. MR. JUSTICE MCBRIDE delivered the opinion of the court.

The plaintiff brought a suit against defendant for divorce, who answered with a cross-complaint, asking that he be decreed a divorce from plaintiff. Upon the trial there was a decree in favor of defendant, from

which plaintiff appeals. The undertaking given by plaintiff complied in form and substance with the statute, except that by a clerical error the undertaking provided that:

“Appellant will pay all damages, costs, and disbursements which may be awarded against the defendant on the appeal.”

1, 2. Defendant's counsel filed a motion to dismiss the appeal on account of the insufficiency of the undertaking, but subsequently consented that plaintiff might file a new undertaking, and one was filed conditioned that plaintiff would pay all damages, costs and disbursements which might be adjudged against her on the appeal, “not to exceed \$100.” Defendant's counsel moved to dismiss this appeal on account of the limitation as to the amount of the penalty. Plaintiff presents a cross-motion for leave to file a new undertaking, and presents an undertaking complete in every respect, except that the affidavit omits these words required by statute: “That I am not a counselor or attorney at law, clerk of any court, or any other officer of any court”—which renders it insufficient. Section 551, L. O. L., provides:

“The undertaking of the appellant shall be given * * to the effect that the appellant will pay all damages, costs, and disbursements which may be awarded against him on the appeal.”

The undertaking, having specifically limited the liability of the surety to \$100, was therefore insufficient: *State v. McKinmore*, 8 Or. 207; *Sanborn v. Fitzpatrick*, 51 Or. 459 (91 Pac. 540). Section 550, L. O. L., as amended by Chapter 319, General Laws of 1913, provides:

“When a party in good faith gives due notice as hereinabove provided of an appeal from a judgment, order or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just.”

The mistake in the undertaking was unintentional, and, the case being here with the briefs filed and ready to be set for hearing, it would be an injustice to dismiss the appeal on account of a defect in the undertaking, which we believe the plaintiff will readily correct by presenting an undertaking complying completely with the statute. We will give her one more opportunity to do this, and an order will be entered allowing plaintiff 10 days in which to file a properly verified undertaking, in default of which the appeal will be dismissed.

CONDITIONALLY ALLOWED.

Argued October 19, modified October 22, 1915.

ON THE MERITS.

(152 Pac. 271.)

Department 2. Statement by MR. JUSTICE HARRIS.

Rosa B. Sutton was divorced from her husband, James N. Sutton. The decree commanded the plaintiff to “deliver to the clerk of this court the photograph of James N. Sutton, Jr., deceased, the property of the defendant, in good condition, to be by said clerk delivered to the defendant.” The trial court also awarded alimony to plaintiff, “the first payment

thereof to be made on or about the twentieth day of the month succeeding the delivery of said photograph as aforesaid, and the subsequent payments to be made on or about the twentieth day of each and every month thereafter until the further order of the court." Each party appealed. The plaintiff complains because the court declined to allow more than \$40 per month as alimony, and she also contends that error was committed in ordering a delivery of the photograph. The defendant insists that the plaintiff is not entitled to any sum as alimony; and he argues, too, that the court erred in not permitting the introduction of certain testimony.

MODIFIED.

For appellant there was a brief with an oral argument by *Mr. H. E. Collier*.

For respondent there was a brief and an oral argument by *Mr. Frederick H. Drake*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The assignments of error embrace three subjects: (a) The exclusion of testimony; (b) the photograph; and (c) the amount of alimony.

3. After hearing the testimony of plaintiff and defendant and reading the deposition of a witness, for plaintiff, and upon being told that the defendant had four or five witnesses, the court said:

"I won't hear that many. * * I think I have heard enough of Mr. Sutton's story, and you can put one more witness on corroborating him, if you have a witness of that character."

Counsel for defendant stated that he had not gone into the amount or nature of certain expenses which

had been incurred, and that the defendant had alleged that he turned over to plaintiff all of the personal property worth about \$1,300. The transcript of the proceedings records the court as then saying that:

"I know how it is in these domestic troubles; the parties want to go into all kinds of details, and the court generally has to take a pretty broad view of matters of this kind. We will not go into details."

Counsel for defendant responded thus:

"We have two witnesses that won't take over five minutes apiece."

And thereupon the court replied:

"Well, call them."

The defendant did not request permission to take any testimony over the ruling of the court, and he did not offer to pay for the recording of such testimony. Although the court did afterward admit evidence concerning the expenses incurred, and while there is no indication of any injury, still it is not necessary to determine whether the defendant was harmed because he did not follow the course prescribed by Section 405, L. O. L.: *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135); *Durkheimer v. Copperopolis Copper Co.*, 55 Or. 37 (104 Pac. 895); *Ollschlager's Estate v. Widmer*, 55 Or. 145 (105 Pac. 717).

4. The trial was completed, and the court rendered an oral decision on February 10, 1915. A formal decree was signed and entered on February 19th, and afterward, on April 17th, the trial judge filed a certificate which recites:

"That prior to the making, settling and signing of the findings of fact and conclusions of law and the making, granting and signing of the decree herein the following statements and admissions were made

to the court with reference to two large photographs of a deceased son of the parties to said suit as follows, to wit:

"That just prior to the close of the trial of said suit on the tenth day of February, 1915, Frederick H. Drake, attorney for defendant, stated to the court that plaintiff has in her possession two identical large photographs of the deceased son of the parties to this suit, one of which is the property of defendant, and asked that plaintiff by the decree be required to turn over to defendant one of said photographs.

"That thereupon H. E. Collier, attorney for plaintiff, admitted and stated to the court that plaintiff has in her possession the said two large photographs; that he would advise plaintiff to turn one of them over to the defendant; and that, therefore, he did not deem it necessary to insert the provision requested by attorney for defendant in the decree.

"That thereafter, to wit, on the nineteenth day of February, 1915, the matter of the settlement of the findings of fact and conclusions of law came on to be heard by the court, the plaintiff and defendant appearing by their attorneys, H. E. Collier and Frederick H. Drake, respectively, at which time attorney for plaintiff stated that plaintiff refuses and would not turn over to defendant either one of said photographs."

The ownership of the photograph is not made an issue by the pleadings, and it was not even mentioned in the evidence. Assuming that the attorney had a right to bind his client by admitting that defendant owned one of the photographs, it will be noted that he did not attempt to exercise the right because no such admission was made. He only admitted that the plaintiff had in her possession the two large photographs, and that he would advise her to turn one of them over to the defendant, and, furthermore, ample notice of the position taken by plaintiff was given to

all parties concerned before the formal decision and decree were entered. While the decree has the merit of being fair and equitable, nevertheless the court was without authority to order the return of the photograph.

5. Pursuant to an agreement of the parties defendant stipulated to transfer his personal property and did convey his real estate to a trustee, who was empowered to sell the land according to his own judgment, and from the proceeds to pay a certain mortgage on the property, to satisfy certain indebtedness of James N. Sutton, and then to deliver the balance, if any, to the plaintiff. The defendant takes the position that the agreement made between the parties precludes the plaintiff from demanding alimony. The mortgage was foreclosed in August, 1914, so that the trustee was practically shorn of his power. The trustee had the right to sell according to his own judgment. The plaintiff did not derive any benefit from the transfer to the trustee, and therefore Rosa B. Sutton is not barred from claiming alimony.

It will serve no useful purpose to relate or discuss the evidence appertaining to the financial condition of the parties; but it is sufficient to say that the ages of the parties, the salary received by the defendant, the loss of property once owned by James N. Sutton and the obligations which he is endeavoring to meet, and the attitude of the plaintiff, when considered together, convince us that the amount of alimony allowed was proper, and the conclusion reached by the trial judge was fair and just to both parties.

The decree is modified so far as it relates to the photograph, but without prejudice to the right of defendant to avail himself of any appropriate remedy

for the recovery of the photograph. In all other respects the decree is affirmed, without costs to either party in this court.

MODIFIED IN PART.

AFFIRMED IN PART.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and
MR. JUSTICE BEAN CONCUR.

Argued July 9, affirmed July 27, 1915.

Rehearing granted September 21, reargued October 11, former opinion approved November 9, 1915.

GRICE v. OREGON-WASH. R. & N. CO.*

(150 Pac. 862; 152 Pac. 509.)

Appeal and Error—Presentation of Grounds of Review in Court Below—Exceptions—Necessity.

1. Where the facts were all stipulated, no exception to the court's decision need be taken under Section 172, L. O. L., declaring that no exception need be taken to any decision upon a matter of law; the judgment being merely an application of the law to the facts.

Commerce—Interstate Commerce—Regulations—Liability of Carriers.

2. The interstate Commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 379), which was designed to prevent preferences, does not prohibit a carrier from assuming the common-law liability in carrying goods from one state to another.

[As to effect of Interstate Commerce Act upon carrier's liability for loss of or injury to goods or baggage, see note in *Ann. Cas.* 1912B, 672.]

Carriers—Carriage of Goods—Action—Burden of Proof.

3. A carrier, seeking to reduce its liability for goods lost in transit, must allege and prove facts entitling it to the reduction.

Principal and Agent—Authority of Agent.

4. A transfer company, authorized to deliver household goods to a particular railroad company for shipment has no authority to consent to a reduction of the carrier's common-law liability, and the agreement reducing the liability is not binding on the shipper.

Carriers—Carriage of Goods—Liability—Stipulation.

5. A bill of lading provided that the amount of any loss or damage for which the carrier was liable should be computed upon the basis

*For rulings on the effect of stipulations as to carrier's liability, see note in 28 L. R. A. (N. S.) 293.

of the value of the property, being the *bona fide* invoice price, unless a lower value had been represented in writing by the shipper, or agreed upon, or is determined by the classification or tariff upon which the rate was based. A carrier lost goods delivered under such a bill. Neither the bill of lading nor the statement of facts on which the cause was tried showed the valuation of the property. The statement of facts failed to show that a value lower than the invoice price had been represented by the shipper, or that a lower value had been agreed upon, or the value as determined by the classification or tariff upon which the rate was based. *Held* that, as none of these matters were disclosed by the pleadings or statement of facts, the carrier was liable for the actual value of the goods under the common-law rule.

[As to limiting by bill of lading carrier's liability, see note in 88 Am. St. Rep. 74.]

Principal and Agent—Waivers—Ratification.

6. For a waiver of liability made by a drayman to an express company to become binding on a shipper by ratification, the company must show that the shipper was fully advised regarding the waiver soon enough to have rejected it.

Principal and Agent—Custody of Goods—Presumption—Waiver to Express Company.

7. Custody of goods at the moment of shipping is not such indicia of authority that agency to waive liability on the part of an express company by which he is shipping them will be presumed.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by Otto Grice and Florence Grice against the Oregon-Washington Railroad & Navigation Company, to recover damages from the defendant, a common carrier engaged in interstate commerce, for failure to deliver goods intrusted to it by the plaintiffs for shipment from Spokane, Washington, to Portland, Oregon. The corporate character of the defendant and the nature of its business are admitted. The complaint alleges that on or about January 21, 1913, in Spokane, Washington, the plaintiffs delivered to the defendant, and it accepted, for transportation by freight to Portland, Oregon, certain of their household goods. It is also alleged and admitted that the plaintiffs paid to the defendant the amount demanded by it as a freight charge for the service contemplated.

The plaintiffs charge, also, that the defendant failed to deliver all the goods, the portion not delivered amounting in value to \$545.54, for which sum they demand judgment. The defendant admits receiving the goods, and that it was unable to deliver a part of the shipment. Other allegations of the complaint are denied, except as stated in the affirmative matter of the answer. The pleading, after averring the corporate character and business of the defendant, proceeds as follows:

"That heretofore, and on or about the twenty-second day of January, 1913, at Spokane, Washington, Otto Grice and Florence Grice, plaintiffs herein, acting by and through one Pacific Transfer Company, which was then and there in the possession of the goods hereinafter mentioned, caused to be delivered to the defendant a shipment of freight, contents and condition of package unknown, and represented by the shipper to be two boxes of household goods, one boxed trunk, one crated cedar chest, and one barrel and contents, weighing 1,280 pounds, prepaying the charges thereon in the sum of \$12.70, with instructions to transport said freight over its line of railroad from Spokane, Washington, to East Portland, Oregon, and there deliver said shipment to Otto Grice. That at the time of delivering said shipment to the defendant, said plaintiffs, by and through their agents and employees, and particularly the Pacific Transfer Company, the shipper in possession, and in charge of said shipment, elected to have said goods transported under the terms and conditions of the uniform bill of lading hereinafter set forth, and then and there issued and delivered to the said shipper, for the said plaintiffs herein, and did then and there release to a valuation of ten dollars per hundred-weight the said shipment, in case of loss or damage to said goods while in transit, and did indorse said agreement upon the bill of lading, issued and delivered to, and received and accepted by, the said plaintiffs, under which

agreement the said shipment was transported. The defendant, Oregon-Washington Railroad & Navigation Company, at all the times mentioned, had in force and effect a rate covering the said shipment, where the same was released to a valuation of ten (\$10) dollars per cwt., and which rate was and is less than the rate charged for shipments not released to ten (\$10) dollars per cwt., and said rates were duly filed, posted, and published as required by the interstate commerce law, and that the shipment moving from Spokane, Washington, to Portland, Oregon, was and is an interstate shipment, and at all times, subject to the rules, regulations, and rates so posted, filed, and published with said Interstate Commerce Commission. That in and by the terms and conditions of said bill of lading under which said shipment moved, it is provided, among other things, as follows: 'The amount of any loss or damage for which any carrier is liable shall be computed upon the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepared) and at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from any negligence.' And said bill of lading further provides: 'It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.' That at the time plaintiffs delivered this shipment to the defendant at Spokane, Washington, they represented to said de-

defendant that said shipment weighed 1,280 pounds, and was of the value of ten dollars per cwt., to wit, of the value of \$128.00, and agreed that in case of loss or damage to said property, or any part thereof, the total value of the same, or the portion lost and damaged, was ten dollars per cwt., and, having so agreed and represented, they secured the lower rate applying on shipments so released and valued. That thereafter, and while said shipment was being transported over the line of railroad of the defendant, a portion of the said shipment was lost, stolen, or damaged, the exact manner of which is unknown to this defendant. That the portion of the shipment which was lost or damaged, as hereinbefore mentioned, weighed 670 pounds, and, under the tariffs, bills of lading, reduced rate, and agreement, as to value of ten (\$10) dollars per cwt., under which this shipment moved, the value of said portion of said shipment so lost and damaged, was and is \$67. That the prepaid charges on 25 pounds—being the portion of said shipment lost or stolen, at the rate of 99 cents per cwt., which was and is the lawful rate applicable thereto—amount to the sum of 24 cents, making a total amount due the plaintiffs of \$67.24. Thereafter, and prior to the commencement of this action, this defendant offered and tendered to the plaintiffs, in full settlement of all liability arising out of the alleged loss set forth in the complaint, the sum of \$67.24, but plaintiffs refused to accept the same. By reason of the premises, the plaintiffs are and ought to be estopped from asserting or from claiming or recovering from defendant any greater sum than \$67.24, for said alleged loss and damage, and this defendant offers to permit the plaintiffs to take judgment for the sum of \$67.24, and that the defendant recover against the plaintiffs its costs and disbursements of this action.”

This new matter is denied by the reply. At the hearing it was agreed in writing by the parties that the cause should be tried, argued and submitted upon the following statement of facts:

“That defendant is now and during all the dates hereinafter mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Portland, State of Oregon, and was engaged, at the times herein named, in the operation of a line of railroad extending from Portland, in the State of Oregon, to Spokane, in the State of Washington, and elsewhere, and was engaged in interstate commerce, and subject to all the provisions and terms of an act of Congress, approved February 4, 1887, entitled ‘An act to regulate commerce’ and acts amendatory thereof. That heretofore, and on or about the twenty-second day of January, 1913, at Spokane, Washington, Otto Grice and Florence Grice, plaintiffs herein, acting by and through one Pacific Transfer Company, which was then and there in possession of the goods hereinafter set forth, caused to be delivered to the defendant a shipment of freight, to wit, two boxes, one trunk, one cedar chest, and one barrel, which said boxes, trunk, cedar chest, and barrel, contained household goods, silverware, and cut glass, weight being 1,280 pounds, prepaying the charges thereon in the sum of \$12.70, with instructions to transport said goods by freight over its line of railroad from Spokane, Washington, to East Portland, Oregon, and there deliver said shipment to Otto Grice. That the plaintiffs instructed the said Pacific Transfer Company to deliver the shipment above mentioned to the defendant, for shipment from Spokane, Washington, to East Portland, Oregon, and said plaintiff gave the Pacific Transfer Company no other or further instructions whatsoever. That defendant, Oregon-Washington Railroad & Navigation Company, at all times mentioned, had in force and effect a rate covering the said shipment, where the same was released to a valuation of \$10 per hundredweight, and which rate was and is less than the rate charged for shipments not released to \$10 per hundredweight, which rate was duly filed, posted and published as required by the interstate commerce law. That a bill

of lading was issued for said shipment of freight as herein referred to, and was given to Pacific Transfer Company and by it sent to plaintiffs at City of Portland, Oregon, at which place plaintiffs were at the time said goods were delivered to defendant. That a copy of said bill of lading as so issued is hereto attached, marked 'Exhibit A,' and made a part of this stipulation. That the agent of said defendant company, who received said shipment at Spokane, Washington, did not inform the Pacific Transfer Company of a valuation having been placed on said shipment, nor of a difference of freight rates for shipments so taken at an agreed valuation and shipments taken without an agreed valuation, and that defendant made no inquiry as to the value of the goods. That while in transit over the line of defendant the goods shipped were lost by theft, and damaged by thieves, as of the agreed loss and damage of \$545.52, which has been demanded of defendant and payment refused. That said goods so lost and damaged belonged to the plaintiffs. That the portion of the shipment which was lost or damaged, as herein mentioned, weighed 670 pounds, and under the released valuation of \$10 per hundredweight the valuation of said portion of said shipment so lost and damaged was and is \$67. That the prepaid charges on 25 pounds, being the portion of said shipment lost or stolen, at the rate of 99 cents per hundredweight, amounting to the sum of 24 cents, making a total due under said released valuation of \$67.24. That defendant, prior to the commencement of this action, tendered to the plaintiffs, in full settlement of all liability arising out of the alleged loss, the sum of \$67.24, but plaintiffs refused to accept the same."

AFFIRMED.

For appellant there was a brief over the names of *Mr. John P. Hannon*, *Mr. Arthur C. Spencer* and *Mr. Charles E. Cochran*, with an oral argument by *Mr. Hannon*.

For respondents there was a brief and an oral argument by *Mr. Lotus L. Langley*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. It is insisted by the plaintiffs that, according to the bill of exceptions, no exception appears to have been taken to the decision of the Circuit Court, and hence nothing is here presented for our consideration.

It is said in Section 172, L. O. L.:

“No exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court.”

The parties agreed upon the facts involved in this litigation. To all intents and purposes their agreement constituted a verdict or declaration of the truth concerning the matters in controversy. It was filed in the court as part of its record, and was binding upon their tribunal, as well as upon its makers; consequently, in the language of the statute referred to, no exception was necessary. The whole question is whether the circuit court reached the proper conclusion from the facts and pleadings submitted to it by the parties.

2-4. On inspecting “A” attached to the bill of exceptions, almost the first language that meets the eye is this:

“This memorandum is an acknowledgment that a bill of lading has been issued, and is not the original bill of lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.”

We may well doubt if this is a sufficient bill to present the question raised. Omitting, however, the quoted memorandum, the document contains this matter:

“Oregon-Washington Railroad & Navigation
Company.

“Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the original bill of lading, at Spokane, 1/21/1913, from Pacific Trans. Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns. The surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by the bill of lading will not be permitted, unless provided by law or unless permission is indorsed on the original bill of lading or given in writing by the shipper. * *

“Consigned to order of Pacific Trans. Co.

“Destination, East Portland, State of Ore. * *

“Notify Otto Grice.

“At East Portland, State of Ore. * * ”

Under head of “Description of Articles and Special Marks” appear these items:

“2 Box H. H. Goods.

“1 “ Trunk.

"1 crt. cedar chest.

"1 bbl. and contents.

"Declared valuation, \$10.00

"Accomplished 1/ 28/ 13.

"J. B. GLOVER.

"Spokane 1098 1/22/13 Pro. 2986 1/28/13."

The weight is given at 1,280, presumably in pounds. The following names appear at the end of the document:

"Pacific Trans. Co. Shipper.

"Per Coker.

"J. C. MAYO, Agent,

"Per H. Agent.

"Per _____."

On the back of this exhibit among others, appear the conditions quoted in the defendant's answer.

In our judgment there is nothing in the interstate commerce law that forbids a common carrier from assuming the common-law liability in the carriage of goods from one state to another. The design of the national legislation on this subject was to extirpate preferences and advantages given by transportation companies to favored shippers, and to compel interstate carriers to treat all alike under the same circumstances. Subject to that congressional statute and the authority of the Interstate Commerce Commission, the carrier is permitted to make reasonable contracts limiting its liability to more favorable terms than the stringent rules of the common law. In the instant case the plaintiffs seek to recover the full value of the goods lost on the hypothesis that they were intrusted to the carrier for shipment and that it has failed to deliver them, and if nothing else is shown that would be the measure of damages. If it would escape responsibility for this amount, the

defendant must allege and prove facts sufficient to entitle it to the desired reduction of its liability. Regarding the stipulation of facts as a full declaration of the truth, it becomes necessary to compare it with the pleading of the defendant, to ascertain how much of the answer is sustained by this conventional verdict.

As noted above, the defendant's pleading states in substance that, acting by their agent, the Pacific Transfer Company, the plaintiffs elected to have the goods transported under the uniform bill of lading, then and there released the property to a value of \$10 per hundredweight in case of loss or damage while in transit, and indorsed the agreement upon the bill of lading. It is conceded on both sides that the property was delivered to the defendant at Spokane by the transfer company as the agent of the plaintiffs. As to the extent of the agency the stipulation is to this effect: That the plaintiffs instructed the Pacific Transfer Company to deliver the shipment to the defendant company for shipment from Spokane to Portland, but gave the transfer company no other or further instructions whatsoever. As stated by Mr. Justice EAKIN in *Baker v. Seaweed*, 63 Or. 350 (127 Pac. 961): "Any person dealing with an agent does so at his peril." It is a general principle, well established by precedent, that if one would charge another by the act of a third party the former must establish the real or apparent authority of the alleged agent. In this instance the extent of the agent's power is stipulated. It was simply to deliver the goods for shipment. The fact has been thus ascertained by the stipulation, and, having been so settled, it is a question of law as to what the agent may do by virtue of such a warrant: *Glenn v. Savage*, 14 Or. 567 (13 Pac. 442).

As a matter of law, it cannot be said that the power of the plaintiffs' agent as defined by the statement of facts was extensive enough to sanction the stipulation for the principals about the value of goods or the agreement to the various conditions and provisos that are usually found on the back of documents like the one in question, unless something more is shown in the way of customary dealings between the parties, or some general usage of which all concerned are deemed to have taken notice as a binding rule of business. It is not pretended that the plaintiffs themselves executed or specially authorized the transfer company to execute for them the so-called bill of lading. Neither is there anything in the stipulation of facts about the plaintiffs having elected to ship under the uniform bill of lading. According to that statement it does not appear that they released the property at a value of \$10 per hundredweight. This converted allegation of the answer about election of conditions and release of value must therefore be held to have failed of proof.

5. The principal controversy is upon the effect of the clause quoted in the answer about the basis upon which damage shall be calculated. An analysis of that excerpt reveals that there are four conditions affecting the calculation of damage in case of loss. The first is the *bona fide* invoice price, if any, to the consignee; but no such valuation appears on the bill of lading or in the stipulation. The second is an exception in case a lower value has been represented in writing by the shipper. The third is when a lower value has been agreed upon; but nothing appears in the statement of facts on either of these subjects. And the fourth is when the value is determined by the classification or tariff upon which the valuation is based. The classification of freight and the tariff

applicable thereto are not disclosed by either the pleadings or the stipulation. Hence there is nothing in the case in the final analysis to affect the valuation one way or the other, with the result that only the true and actual worth of the goods is open to consideration. The statement of facts is also silent upon the allegation of the answer that the plaintiffs represented the shipment to be of the value of \$10 per hundredweight. In short, the proof as agreed upon by the litigants does not establish the defendant's case as made in its answer. Having admitted that it received the goods for transportation and that it failed to deliver part of them, the defendant was liable under the common-law rule for the actual value of the lost chattels, unless it had shown a lawful contract lessening its liability. The declaration of the truth settled by the parties does not disclose the necessary excuse in favor of the defendant. In this state of the case the Circuit Court drew the only proper conclusion from the agreed facts.

The judgment is affirmed.

AFFIRMED. REHEARING GRANTED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and
MR. JUSTICE BENSON CONCUR.

Former opinion sustained November 9, 1915.

ON REHEARING.

(152 Pac. 509.)

On rehearing for appellant there was a brief over the names of *Mr. Charles E. Cochran*, *Mr. John P. Hannon* and *Mr. Arthur C. Spencer*, with oral arguments by *Mr. Cochran* and *Mr. Hannon*.

For respondents there was a brief with an oral argument by *Mr. Lotus L. Langley*.

In Banc. MR. JUSTICE BURNETT delivered the opinion of the court.

A statement of the issues in this case appears at page-18, 78 Or. (at page 862 of 150 Pac.), and need not be here repeated. On the rehearing the defendant argued that, under the stipulation of facts, the plaintiffs were bound by all the acts of the Pacific Transfer Company of Spokane, including the execution by it of the bill of lading which the defendant contends released the value of goods to \$10 per hundredweight, carrying with it a reduced rate of freight and the accompanying waiver of all value in the settlement of damages for loss of goods above the conventional appraisement. In substance, the defendant maintains as a principle that whoever has possession of goods and tenders them to a common carrier for shipment has apparent authority to bind the owner by any lawful contract of carriage. A number of New York cases are cited in support of this doctrine. The leading one is *Nelson v. Hudson R. R. Co.*, 48 N. Y. 498. There the plaintiff had bought a large mirror from a firm dealing in such goods, and directed the seller to ship it to him by the defendant's railroad. A custom relating to such shipments was known to the firm to the effect that freight of that kind in packages too large to be put into closed cars should be carried on open cars, but at a valuation lessening the amount of damages to be assessed in case of loss. The firm sent the mirror to the railroad company, which issued a restricted receipt according to the usage, and agreed to hold the property until the seller should examine the same and determine whether to accept those conditions or to retain the goods. After

waiting the stipulated time and hearing nothing further, the company forwarded the goods, which were damaged en route. In the opinion by Judge Hunt it was held that the firm had apparent authority to agree to the release. An opinion by Mr. Justice EARL concurs on the ground that the firm had ratified the release after knowing all the facts, but held that its cartman had no authority to make the contract. He made the matter to depend entirely upon ratification. It is significant that the opinion quotes with approval from Redfield, Carriers, § 52:

“As a general rule, the agent to whom the owner intrusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation. By this we do not mean the porter or cabman, or mere servant, but the consignor of the goods, or any other agent of the owner who purchases or procures them for him.”

Another precedent is *California Powder Works v. Atlantic & Pacific R. R. Co.*, 113 Cal. 329 (45 Pac. 691, 36 L. R. A. 648). The plaintiff manufactured powder at Santa Cruz, California, and habitually transported it by narrow-gauge railroad to San Jose, where it became necessary to convey it in trucks to the depot of the defendant and load it on the defendant's broad-gauge cars. During a period of several years this transfer from one road to the other had been committed to a certain drayman, and a course of business had grown up between the parties whereby he in every instance executed the ordinary release of valuation and exemption from damages beyond a certain sum. It was there held that all these circumstances raised an apparent authority of the drayman to execute the release, so that for the loss of a carload of powder by explosion during transportation the

plaintiff was allowed to recover only the lesser valuation. In *Adams Express Co. v. Carnahan*, 29 Ind. App. 606 (63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279), the plaintiff declared specially on a contract made with his agent, and, of course, could not repudiate part of that agreement and rely upon the rest. In *Atchison etc. Ry. Co. v. Baldwin*, 53 Colo. 416 (128 Pac. 449), the contract of shipment was made by one who had been employed by the plaintiff company several years in that business, and the stock in question was shipped in the presence of one of the owners. In *Blair v. American Forwarding Co.*, 159 Ill. App. 511, the defendant was a forwarding company and made its profits in business by accumulating from individual purchasers different small lots of freight, and combining them until they would amount to enough to fill a car, when it would ship the goods in its own name, and, in pursuance of a custom which had grown up in the business, would sign the lease. It was decided that under these circumstances the defendant would not be held for more than the stipulated value. In *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239 (93 Am. Dec. 162), a drover was accompanying a cargo of hogs destined to a distant point. During the journey it became necessary to change them into the cars of another transportation company, and it was held that he had apparent authority to execute the usual release. In *Peirce v. American Express Co.*, 210 Mass. 383 (96 N. E. 1026), the plaintiff had sent part of his automobile to a repair-shop in Boston, with instructions to return it to him by express. It was held that the repairer had authority to take the usual receipt. In *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379 (158 S. W. 464), the plaintiff had bought a carload of mules and directed the seller to

attend to all the details of shipping them to him, which, it was decided, gave the seller apparent authority to execute a release. In *Willard v. Chicago & N. W. R. R. Co.*, 150 Wis. 234 (136 N. W. 646), the plaintiff went with his hired man and loaded his horses into the defendant's car. He then went away, directing the man to attend to getting the bill of lading. It was held that there was apparent authority in the hired man to execute the release. In *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508 (58 L. Ed. 703, 34 Sup. Ct. Rep. 380), the plaintiff had intrusted her goods to a forwarding company, which obtained carload rates by combining small shipments, and it was held that, if, the defendant was a shipper to obtain carload rates, it was also a shipper to agree upon released valuation. In the forwarding company cases it appears that the defendants were interested directly in the rates, and made their profit by combining small shipments into carload lots, getting carload rates, and charging their customers part of the difference between them and the greater ones upon small lots. The element of special circumstances runs through all the precedents cited by the defendant, and indicates that the person attending to the transportation of the goods had a more intimate connection with them than that of a mere drayman or servant.

A case more applicable to the instant litigation is *Benson v. Oregon Short Line R. R. Co.*, 35 Utah, 241 (99 Pac. 1072, 136 Am. St. Rep. 1052, 19 Ann. Cas. 803). The plaintiff, at Butte, Montana, employed a man to pack and deliver at the defendant's depot for shipment to Logan, Utah, certain household goods. These were taken to the depot by the man, and by him delivered to the defendant to be shipped. He signed

a release much the same as the one here involved. A clause of the syllabus reads thus:

“The drayman employed by a shipper to take goods to a railroad depot and ship them is not authorized to enter into a contract with the carrier limiting the carrier’s liability, and the shipper is not bound by the contract, the drayman not being one who was in the habit of taking plaintiff’s goods to the depot and arranging for their shipment, and the shipper not being furnished with a copy of the contract, and not knowing of its existence until long after the goods were shipped.”

In *Hill v. Adams Express Co.*, 77 N. J. Law, 19 (71 Atl. 683), the following appears in the syllabus as expressive of the doctrine of the case:

“A box to be shipped by Adams Express Company to Ireland was called for at the residence of the shipper by a driver of a local transfer company and delivered by him to the express company with a prepayment of the charges; nothing being asked or said as to valuation. The receipt that was handed to the driver of the transfer company by the express company was delivered by him to the shipper two days later, at which time the box, while in the possession of the express company, had already been destroyed by fire. In an action brought by the shipper against the express company for the value of the box, held, that a motion to nonsuit was properly denied, and that a request that the plaintiff’s recovery be limited to \$50 pursuant to a provision in the express receipt was properly refused. Where a shipper employs a common carrier (in this case the Union Transfer Company) to carry goods to an express office (in this case Adams Express Company) for shipment, the driver of the wagon of the local carrier who delivers the goods to the express company is not a servant or agent of the shipper with whom the express company may make a special contract binding the shipper in the event of

loss to a limitation of such carrier's common-law liability."

In *Stickel v. United States Express Co.*, 85 N. J. Law, 285 (89 Atl. 23), the plaintiff ordered the express company to call at her room and get a trunk for shipment. She told her landlord to let the defendant have the trunk and get a receipt. He took a restricted receipt, and it was held that he exceeded his apparent authority. In *Hayes v. Adams Express Co.*, 74 N. J. Law, 537 (65 Atl. 1044), the defendant's driver got a drop curtain from the plaintiff's employee, who issued a limited liability receipt. It was held to be disputable whether the plaintiff assented to the terms of the document. In *Schlosser v. Great Northern Ry. Co.*, 20 N. D. 406 (127 N. W. 502), the court refused to recognize one in custody of certain horses as having apparent authority to execute a released valuation contract in the name of the plaintiff. In *Hailparn v. Joy S. S. Co.*, 50 Misc. Rep. 566 (99 N. Y. Supp. 464):

"The owner of goods, with a truckman, took them to a carrier; the owner leaving the truckman to deliver them, get a receipt therefor, and deliver it to the owner's wife. The truckman delivered them, got a bill of lading, naming him as 'owner or shipper,' and the owner as consignee, and without examination signed in his own name a paper handed him by the carrier's agent, who knew he was merely a truckman, with the direction that he sign 'this release,' which recited that, in consideration of the transportation of the goods at 'reduced rates,' of which fact there was no other evidence, liability for damages from negligence of the carrier was released. Held, that the release was ineffectual; there being nothing to show it was accepted by the shipper."

6, 7. In the instant case the stipulation says:

"That the agent of said defendant company who received said shipment at Spokane, Washington did not

inform the Pacific Transfer Company of a valuation having been placed on said shipment, nor of a difference of freight rates between shipments so taken at an agreed valuation and shipments taken without an agreed valuation, and that defendant made no inquiry as to the value of the goods."

It is true indeed, the stipulation contained this clause:

"That a bill of lading was issued for said shipment of freight as herein referred to and was given to Pacific Transfer Company, and by it sent to plaintiff at the City of Portland, Oregon, at which place plaintiffs were at the time said goods were delivered to defendant."

It does not appear, however, that the plaintiffs received the document prior to the loss of the goods, or that they had an opportunity to either ratify or reject the same until it was too late to take such action. In this respect the case is parallel to that of *Hill v. Adams Express Co.*, 77 N. J. Law, 19 (71 Atl. 683). In all instances ratification must proceed upon a knowledge by the party to be charged of all the facts relating to the transaction which it is sought to enforce against him. Everything at Spokane, including the prepayment of the charges, was done by the transfer company. The argument of the defendant depends upon the fallacy that the payment of the amount charged for freight was made directly by the plaintiffs, but the stipulation will not bear this construction. The essence of the controversy here narrows down to the question of whether or not in all cases the person at the moment in custody of goods has apparent authority to bind the owner to conditions lessening the efficacy of his remedy against the trans-

portation company for loss of goods en route. It is stipulated:

“That the plaintiffs instructed said Pacific Transfer Company to deliver the shipment above mentioned to the defendant for shipment from Spokane, Washington, to East Portland, Oregon, and said plaintiffs gave the Pacific Transfer Company no other or further instructions whatsoever.”

This agreed fact shows no further or different circumstance than attends the most irresponsible transient drayman whose entire connection with the transaction ends when he unloads the chattels at the freight depot and receives his cartage from their owner. The plaintiffs did not order the transfer company to ship the goods which might include the authority to make the contract. The direction was only to deliver the goods to the defendant for shipment, in which case both the duty and authority of the transfer company ended with the delivery of the goods; in other words, there is nothing in the case at hand distinguishing the transfer company from any other chance employee. There is no magic in the words “the transfer company” which differentiates that concern from any other occasional truckman. This isolated instance is far different from a long course of business and other circumstances disclosed in the precedents the defendant has cited. In those a much more intimate relation to the property by the person in custody of the same is shown than appears in this case.

It is laid down in *Lacey v. Oregon R. & N. Co.*, 63 Or. 596 (128 Pac. 999), that, where the defendant carrier alleges a special contract lessening its common-law liability, it must prove the same. As stated in *Russell v. Erie R. R. Co.*, 70 N. J. Law, 808 (59 Atl. 150, 67 L. R. A. 433, 1 Ann. Cas. 672):

“The burden of proof of showing such a limitation of liability is on the defendant company and, being in derogation of common right, is to be construed most strongly against the carrier: 5 Am. & Eng. Ency. Law (2 ed.), 336; *Ashmore v. Pa. Stream Towing & Trans. Co.*, 28 N. J. Law, 180; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11 (85 Am. Dec. 211). No presumptions will be indulged in in favor of exemptions from common-law liability.”

Applied to this case, it is incumbent upon the defendant to show something more than the transient drayman's mere casual connection with the goods. Having proven nothing further than that, it has fallen short in its effort to establish its special contract; for it cannot be accepted as an unvarying and inflexible rule of law that any and everyone whomsoever, momentarily in custody of goods, may subject them to a contract of carriage so vitally affecting the owner's interest.

We adhere to the former opinion.

AFFIRMED. SUSTAINED ON REHEARING.

Argued September 14, affirmed October 5, rehearing denied November 9, 1915.

HANSEL v. NORBLAD.

(151 Pac. 962.)

Cancellation of Instruments—Actions—Averments of Fraud.

1. In a suit to set aside conveyances as procured by fraud and undue influence, the facts showing the fraud must be alleged, and bare averments that the transaction was carried out fraudulently, willfully and by false pretenses is not enough.

[As to cancellation of instruments for forgery, see note in 92 Am. St. Rep. 272.]

Deeds—Evidence—Sufficiency.

2. In a suit to set aside conveyances, evidence *held* insufficient to show that at the time of the conveyance the grantor was incompetent.

[As to contracts between attorney and client, see note in 83 Am. St. Rep. 158.]

Attorney and Client—Transactions—Validity.

3. In view of Section 561, L. O. L., declaring that the measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties, an agreement as to compensation between attorneys and one who desired to retain them, made before the relation of attorney and client existed, cannot be repudiated because of the subsequent confidential relation.

Attorney and Client—Agreements—Validity.

4. After the relation of attorney and client is established, an agreement between the attorney and his client is binding, if the client knows all the facts and is fully advised as to the situation.

Attorney and Client—Agreements—Compensation.

5. An agreement by one accused of murder to pay each of the two attorneys retained to represent him \$1,000 does not show that the fee is so excessive as to impute fraud to the attorneys.

Attorney and Client—Compensation—Agreements—Validity.

6. In a suit to set aside conveyances made to secure counsel their fees in defending a murderer, in view of Section 2385, L. O. L., which made the costs recoverable by the state a prior lien, evidence of the value of the property and the liens on it *held* not to show that the instruments were procured by fraud.

From Clatsop: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit originally brought by Oswald C. Hansel, for whom was substituted Paul Hansel, styling himself trustee, to set aside a mortgage made to the defendant A. W. Norblad and a deed to C. W. Mullins covering real estate in Clatsop County, as well as a bill of sale to both of them of personal property belonging to Oswald C. Hansel. The realty is alleged to be of the value of \$8,000, subject to a mortgage for \$1,000 and a judgment for \$1,841. After alleging that the defendants A. W. Norblad and C. W. Mullins were and are practicing attorneys at law, the complaint contains these allegations:

“That on the fourteenth day of September, 1913, said Oswald C. Hansel was committed to the county jail of Clatsop County, Oregon, on the charge of murder in the first degree, and that during all the time of his incarceration, and particularly the first few days following the commission of the crime with which he was charged, he was in a state of mental collapse and general nervous breakdown, as a result of the gradual realization of the heinousness of the offense committed while laboring, as this plaintiff believes, under a hallucination growing out of the domestic difficulties heretofore related, and his perturbed mental condition arising therefrom, and that while in said state of mental collapse and general breakdown, and while the said Oswald C. Hansel was mentally irresponsible and unable to comprehend what he was doing, or to resist an attempt at undue influence, the defendants A. W. Norblad and C. W. Mullins, well knowing the condition of the said Oswald C. Hansel, under the pretext of entering upon a defense of the said Oswald C. Hansel for the crime with which he was charged, in truth and in fact entered, instead, into a conspiracy to obtain ownership and possession, fraudulently and willfully, of the said property of the said Oswald C. Hansel, and that on the nineteenth day of September, 1913, at the county jail of said Clatsop County, the said defendants, in pursuance of said conspiracy, fraudulently, willfully, by false pretenses, and by exercising an undue influence over the said Oswald C. Hansel while in the mental and nervous state above related, prevailed upon the plaintiff to execute, under the pretext of defending him, but as a matter of fact without consideration, a mortgage for \$1,000 upon the property of the said Oswald C. Hansel aforesaid in favor of defendant A. W. Norblad, which said mortgage is recorded in Book 35 of Mortgages at page 319, Mortgage Records of Clatsop County, Oregon.

“That the defendants claim that on the twenty-third day of September, 1913, three days following the execution of mortgage aforesaid, the said Oswald C. Hansel executed a warranty deed to defendant C. W.

Mullins conveying the aforesaid property of the said Oswald C. Hansel to said C. W. Mullins, which alleged deed is recorded in volume 81 of Deeds at page 384, Deed Records of said Clatsop County, Oregon. It is alleged that no such deed was ever executed by him with his knowledge, and that if by any possibility it was executed by him, it was while in the aforesaid state of mental collapse and nervous breakdown, and was obtained fraudulently, willfully and by the exercise of undue influence over a mentally irresponsible person, and was furthermore without any consideration whatsoever."

A similar averment concerning the transfer of Hansel's personal property to Norblad and Mullins also appears in the complaint, but no further notice will be taken of the same, because in their answer the defendants disclaim any interest whatever in the personalty. The execution of the mortgage and deed are admitted, but all the imputations of fraud, undue influence and incapacity of the grantor in the execution of each instrument are traversed by the answer. The value of the realty is placed by the defendants at \$5,000. They allege the details giving rise to the prior mortgage and judgment showing, as admitted by the reply, that the former was for \$1,000, with interest thereon at 8 per cent per annum from March 21, 1913, and the latter was in favor of the former wife of Hansel for \$1,800, with interest from August 30, 1913, which judgment was paid October 21, 1913, by the defendant A. W. Norblad, amounting at that date to \$1,876. The answer also maintains, and it is not denied, that the State of Oregon, in the case of the state against Oswald C. Hansel, had recovered a judgment for \$622.70, docketed September 30, 1913, which remains unpaid, together with taxes on the premises in the sum of \$51.25. The defendants set out the particulars of the

execution and delivery of the mortgage to Norblad and the deed to Mullins, and aver, in substance, that the same were executed for a valuable consideration, in good faith, in payment for their services to be rendered in defending Hansel upon an indictment charging him with the crime of murder in the first degree. They state that the mortgage and deed were executed and obtained by them without any conspiracy, fraud or false pretense whatever, and while Hansel was in a perfectly rational and responsible mental condition, appreciating and knowing what he was doing. It is admitted that Mullins and wife afterward conveyed the land to Norblad. The reply traversed the affirmative matter of the answer in important particulars not necessary to be detailed.

It appears that Hansel was convicted of the crime charged against him, and was executed under the law then providing for capital punishment. Prior to his execution he gave his deposition in this cause, and the same was suppressed by order of the Circuit Court for certain irregularities respecting its custody after it had been taken. The court heard the other testimony and rendered a decree to the effect that the complaint should be dismissed and the defendant Norblad declared to be the owner in fee simple of the premises as against the present plaintiff. The plaintiff appealed. **AFFIRMED. REHEARING DENIED.**

For appellant there was a brief and an oral argument by *Mr. George Arthur Brown*.

For respondents there was a brief over the names of *Mr. Frank C. Heese*, *Mr. A. W. Norblad* and *Mr. C. W. Mullins*, with an oral argument by *Mr. Heese*.

MR. JUSTICE BURNETT delivered the opinion of the court.

Some question was made at the argument by the defendants here about the sufficiency of the complaint respecting the plaintiff's right to maintain this suit, and they also urged that the deposition of Hansel was rightfully suppressed. We ignore these contentions without deciding them, and treat the case as though the plaintiff here had the right to continue the prosecution of this suit as the successor in interest of the original plaintiff, Oswald C. Hansel. We also assume that the deposition was regularly taken and transmitted to the Circuit Court, and have carefully read the same as part of the evidence in the case.

1. The defendants contend also that the complaint does not state facts sufficient to constitute a cause of suit. As to the capacity of Hansel to make a contract the allegation possibly might stand in the absence of any demurrer or motion to make the same more definite. No false pretense or any act of fraud is alleged, and in respect to the averment concerning conspiracy, undue influence, and the use of a pretext of defending Hansel the complaint does not state more than mere conclusions of law, and does not set forth any fact necessary to serve as a basis for relief. It is not alleged in any way that the defendants did not carry out their agreement to defend Hansel, and they are not charged with having made any untrue statement or promise whatever. As stated in *Leavengood v. McGee*, 50 Or. 233, 239 (91 Pac. 453, 456):

"The rule is that the facts upon which fraud is predicated must be specifically pleaded. A mere general averment of fraud is nothing but the averment of a conclusion, and will not suffice. It presents no issue for trial, and is bad on demurrer. Such an averment

not only renders the bill or complaint demurrable, but it will not even sustain a decree": 20 Cyc. 734; *Leasure v. Forquer*, 27 Or. 334 (41 Pac. 665).

Adverbs are not allegations, and to say that a transaction was carried out "fraudulently, willfully, by false pretenses" is not sufficient unless the false pretenses are set out and the acts or representations constituting the fraud are clearly stated. So far as the matter is affected by the relation of attorney and client, the statement in the complaint utterly fails to show that the relation existed at the time the transaction took place or that it influenced the plaintiff's predecessor in the least. The complaint is insufficient as far as a charge of fraud or undue influence is concerned.

2. A careful reading of the testimony fails to disclose any showing whatever that at the time of the execution of the papers in question Hansel was insane. On the other hand, it clearly appears from the evidence that he fully comprehended the nature and quality of the act involved, and that he executed the instruments well knowing the purpose for which they were made and the purport of the same. It is in the record that after he was arrested for murder he first sent for the defendant Mullins and employed him in his defense. Mullins testified to the effect that he attended at the jail where Hansel was confined, and they agreed that the fee for defending him should be \$1,000. Nothing appears to have been said at the time about securing payment of this compensation. Mullins went from Astoria to Portland for the purpose of engaging other counsel to assist. He says this was done at the instance of Hansel, but the latter denies it, contending that Mullins did so on his own motion. During the absence of Mullins, Hansel requested a friend to get

the defendant Norblad to visit him, whom he also engaged in his defense, promising to give him \$1,000. Concerning the amount stipulated as compensation for Norblad and Mullins, Hansel does not contradict them in his deposition. The only evidence on the subject of the sums settled upon as attorney's fees is the deposition of Hansel and the testimony of Norblad and Mullins. They do not differ on that point. As to the fee of Norblad, he is corroborated by the testimony of Mr. Kaboth, a friend of Hansel, with whom the latter consulted in regard to the terms and nature of the mortgage. The documents were thoroughly explained to Hansel by Kaboth both in German and in English, and it was after thus counseling with the latter that Hansel executed the security to Norblad. The execution of the note and mortgage is substantially admitted by Hansel in his deposition. As to this latter instrument, the only contention which Hansel made is that Norblad was to take the mortgage for \$1,000 and pay both himself and Mullins. The fact, however, is undisputed that after Mullins and Norblad had stated to Hansel the amount of their fees, and, as they say, and he does not deny, he agreed to them, Norblad prepared a note and mortgage for \$2,000 running to him and Mullins, and, in the absence of the latter, took the same to the jail to be executed, when Hansel demurred to the amount. After Hansel had consulted with his friend Kaboth, Norblad, seeking to secure his own fee, erased Mullin's name and the amount of \$2,000, and inserted as the principal of the note and mortgage the sum of \$1,000, leaving the instruments as security for that amount running to Norblad alone. In this form Hansel executed and delivered them to Norblad. Under these circumstances we conclude that the note and mortgage involved con-

tained the true agreement of the parties at the time; for, if Norblad was to have paid the fee to Mullins, the only objection naturally to be charged by Hansel against the instrument as first proposed would have been the amount, and the name of Mullins would have been left intact.

As to the deed subsequently made in favor of Mullins, Hansel utterly denies the execution thereof, but we have the testimony of Mullins himself, of Norblad, and of Jeffries, a totally disinterested witness, all declaring that Hansel read the deed and executed the same understandingly and in full acquaintance with its terms. These witnesses give details and circumstances of the transaction opposed to which is the mere flat denial of Hansel. The weight of the testimony preponderates greatly in favor of the defendants on the issue of the actual execution of the deed.

3-6. The principal question which we have to determine is that charged by the plaintiff to the effect that these were transactions between attorney and client, and that the burden is upon the defendants to show the utmost good faith on their part toward their client. It is declared in Section 561, L. O. L., that:

“The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties.”

It thus appears that under our statute the matter of inaugurating the relation of attorney and client is a legitimate subject of contract. In point of law it does not differ from any other matter about which parties may agree. Without dispute in the instant case the relation was sought by the plaintiff's predecessor in interest on his own motion. It was at his instance that the defendant attorneys attended upon him, and

they began at arm's-length their negotiations about the compensation to be awarded them. In the inception of the transaction all parties broached the subject of establishing the relationship of client and attorney like participants in any other business affair. Hansel was at liberty to employ them or not, as he chose. Even his deposition does not impute to them any persuasion, overreaching, or anything of that sort. It cannot be said in reason that because a man is an attorney he is under any disability whatever in making a contract with one who seeks to become his client. As stated in 3 Am. & Eng. Ency. Law, p. 334:

“An attorney is under no actual incapacity, however, to deal with or purchase from his client; all that can be required is that there shall be no abuse of the confidence reposed in him, no imposition or undue influence practiced, nor any unconscionable advantage taken by him of his client. As has been stated, in a transaction of this character the burden is upon the attorney to show its perfect fairness; but if the court is satisfied that the party sustaining the relation of the client performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that no concealment or undue means were used to secure his consent to what was done, the transaction will be upheld. * * To entitle the client to relief from a contract or agreement entered into with his attorney, it must be shown that the client has suffered some injury through an abuse of confidence on the part of his attorney. To show merely that the relation of client and attorney existed, and that during the subsistence of the relation the parties entered into a contract, without showing that the client was induced thereto by an abuse of confidence by the attorney, is not enough.”

In other words, it would not be sufficient for a plaintiff to say:

“I made a contract with a man who was an attorney at the time. I demand that it be set aside.”

The relation of attorney and client begins when the contract of employment is consummated: 3 Am. & Eng. Ency. Law (2 ed.), 316. Our statute makes the compensation of the attorney a proper subject of contract. The parties approach the subject matter from opposite sides, and deal in the contract of employment on equal terms like participants in any other lawful business. The plaintiff would overturn the agreement thus made merely because one of the contracting parties happens to be a practicing lawyer. Such a contention has no foundation in either law or reason. This, however, is the substance of the complaint in this suit as far as the making of the contract of employment is concerned, and is the purport of the argument for the plaintiff. The authorities cited by the plaintiff all relate to transactions occurring after the relation had been established and the confidence attendant upon the same had accrued. The reason of the rule does not apply to the precedent transaction of parties looking to the employment of an attorney. We fully concur in all the cited precedents say about the good faith required of attorneys in their dealings with clients; but especially in the preliminary bargain the rule goes no further than to ascertain if the parties are free and competent to contract and are not laboring under any impediment caused by fraud, undue influence or abuse of confidence. Even after the confidential relation is established the authorities agree that, if all the facts were known to the client, and he was fully advised of the situation, if no attempt was made to mislead or deceive him to his hurt, and if he knowingly and understandingly entered into the agreement, it is as binding

upon attorney and client as it is upon any other individuals competent to contract. In the instant case Hansel knew every circumstance affecting the transaction. He knew the nature and amount of his property. He himself had made the situation in which he found himself. He took the initiative in the employment of the attorneys by sending for them. He does not dispute that each was to charge him \$1,000. The property was his, and he had a right to dispose of it as he saw fit. No attempt whatever is made to show that he was insane or unable to comprehend the nature, quality and consequences of the business in which he was engaged. He was clearly a competent contracting party, and knew and understood the transaction and all the circumstances surrounding it as well as any other person concerned. Under such conditions the court cannot make a contract for him. He freely stipulated as stated, or he did not. The great preponderance of the testimony is that he did contract for the amount of fees claimed by the defendants. In the face of his denial of the execution of the deed we have the testimony of at least one disinterested witness to the effect that Hansel admitted the execution thereof after having read it and signed it. The subscribed name as it appears upon the original deed in evidence compares with the admitted signature of Hansel to the mortgage, which is also in evidence, as well as with his signature to his deposition, to which we have given full consideration. There is no reasonable question but that Hansel did execute the deed.

The burden of the complaint made in argument by the counsel for the plaintiff is that the property first mortgaged and afterward conveyed was disproportionately greater in value than the reasonable worth of the

services of the defendants in the defense of Hansel. The amount to be paid for the services was fixed by the original contract for the same at the inception of the transaction, and was not a matter referable to the confidential relation existing between attorney and client after the same was established. Being free to contract or not on the matter of fee to be charged, Hansel stood in no different relation to the defendants than he would have with any other party; and, moreover, we are not prepared to say from the testimony that the fee charged for defending a man for murder in the first degree is so excessive as to impute fraud to the attorneys. The defendant attorneys are criticised by some of the plaintiff's witnesses for not securing a change of venue in the murder case, but the testimony is undisputed that Hansel insisted on being tried in Clatsop County, and it was only at the last moment before the trial began that he consented that the effort be made to effect the change. The record of that case is before us in evidence containing affidavits tending to show public prejudice against Hansel, and discloses that the court denied his counsel a respite of only a half an hour in which to complete their showing for a change of venue. For all that appears in the record, all was done for him that could have been done by anyone at the trial.

The testimony about the value of the property involved, as usual in such cases varies greatly. It consisted of about 100 acres of land near Warrenton, in Clatsop County. Its value, as estimated by witnesses, ranges all the way from \$4,000 to \$10,000. Admittedly it was encumbered by a mortgage of \$1,000 and a judgment paid at \$1,876. Besides this, there was the prospect of the state acquiring a lien upon the same in a then unknown sum for the costs and disbursements

attending the prosecution of the defendant in the criminal action. As the event proved, this amounted to \$622.70, and, according to Section 2385, L. O. L., this was a lien upon the property from the time of the commission of the offense antedating both the deed and the mortgage here in question. Counting interest, the total liens upon the place amounted to \$3,500, in round numbers. Estimating the equity of redemption at \$2,000, the amount which Hansel agreed to pay his attorneys, would make the value of the property \$5,000. Taking the wide divergence of the testimony into consideration, this is not so disproportionate as to constitute fraud. In *Sherman v. Glick*, 71 Or. 451 (142 Pac. 606), this excerpt from 2 Pomeroy's Equity, section 922, is quoted with approval:

“If there is nothing but mere inadequacy of price, the case must be extreme in order to call for the interposition of equity. When the inadequacy does not thus stand alone, but is accompanied with other inequitable incidents, the relief is much more readily granted. But even here the courts have established clearly marked limitations upon the exercise of their remedial functions, which should be carefully observed. The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not a sufficient ground for relief, provided the parties are both able to judge and act independently and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstances of oppression.”

In its aspect as a charge of fraud the complaint is utterly insufficient. The testimony does not in any sense show a mental condition of Hansel disqualifying him from entering into any contract he chose to make.

The amount of the fees was fixed while the parties were at arm's-length as a prelude to the employment of defendants. In that feature the transaction is not affected by the confidential relation of attorney and client. More than that, the testimony does not show that the defendants used any fraud, duress or misrepresentation in contracting with Hansel, and the evidence is clear that he knew all about the transaction and its effects. He chaffered and dickered with them over the matter as any other trader, but the same was finally settled as stated. It is written large throughout the testimony that he fully understood the situation in all its bearings. He had a right to convey his farm, and, in the absence of any overreaching, fraud or abuse of his confidence in the grantees, the transaction will stand as he left it. For want of any testimony showing disabling mental defect in Hansel, in the face of his utter denial of the execution of the deed to Mullins, and considering that the complaint is insufficient for that purpose, we are cut off from declaring the deed a mortgage and ordering its foreclosure. If its execution had been admitted with an allegation of an agreement that, although absolute in form, it was agreed upon by the parties that it should be a security merely, a different question might be presented, but no such record is before us.

The decree of the learned circuit judge, who heard and saw the witnesses, and who was conversant with all the incidents of the defense, is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS CONCUR.

Argued September 29, dismissed October 19, rehearing denied November 9, 1915.

MONTESANO LUMBER CO. v. PORTLAND IRON WORKS.

(152 Pac. 244.)

Sales—Conditional Sales—Recording—Place for Recording.

1. Under Rem. & Bal. Code Wash., Section 3679, providing that articles of incorporation shall state the name of the city, town or locality and county in which the principal place of business of the company is to be located, and Section 3670, providing that conditional sales shall be absolute as to purchasers in good faith unless within ten days after taking possession by the vendee a memorandum of the sale shall be filed in the auditor's office of the county wherein the vendee resides, and the decisions of the Supreme Court of Washington that the residence of a corporation is the city and county named in its articles of incorporation as its principal place of business, a conditional sale to a Washington corporation of machinery and equipment to be installed in a sawmill was void as against a purchaser in good faith, where, though the contract was recorded in the county in which the sawmill was situated, it was not recorded in the county designated in the articles of incorporation as the principal place of business of the corporation.

Sales—Conditional Sales—Recording—"Purchaser."

2. Where, under a lease of a sawmill, the lessee was to pay a specified monthly rental, and pay \$10,000 in advance in machinery and equipment, and it was provided that upon the installation of such machinery and equipment it should be and become the property of the lessor, the title to the machinery and equipment vested in the lessor at the moment it was installed by the terms of the lease, whether or not it was so permanently attached to the building as to become a fixture, and the lessor was a "purchaser" thereof within Rem. & Bal. Code Wash., Section 3670, making conditional sales absolute as to purchasers unless a memorandum of the sale is filed in the auditor's office of the county of the vendee's residence.

[As to when person holding property under conditional sale may transfer a perfect title, see note in 134 Am. St. Rep. 277.]

Courts—Local and Transitory Actions—Actions for Injuries to Real Property.

3. An action for trespass on real property being local an action for an injury to real property in the State of Washington cannot be maintained in the courts of Oregon, especially in view of Section 42, L. O. L., providing that an action for injuries to real property shall be commenced and tried where the property is situated; this being a tacit recognition of the common-law rule as to this class of actions.

Courts—Local and Transitory Actions—Actions for Injuries to Real Property.

4. A complaint alleged that plaintiff owned a sawmill which it leased to certain parties who agreed to purchase and install certain

machinery, tools, etc., and that the machinery, when so established, should become a part of the realty and the property of plaintiff; that for the purpose of complying with the lease the lessee's assignee purchased of defendant certain machinery, tools, etc.; that such machinery, tools, etc., were sold and delivered to the assignee, and by the assignee duly installed in the mill, and became a part thereof and affixed and attached thereto; that defendant entered upon such mill premises and tore down and dismembered the sawmill, and took therefrom such machinery, tools, etc., which were then necessary for the operation of the mill, and, having dismantled the mill and torn and taken therefrom a large amount of the machinery, tools, etc., took away all such machinery, tools, etc.; that by such action the sawmill and sawmill plant was made useless and worthless, and it had become impossible to operate it; that the machinery, tools, etc., which defendant left in the mill were useless and practically without value; and that by the wrongful and unlawful action of the defendant plaintiff had been damaged in the sum of \$10,000. There was no allegation that the machinery carried away was of any particular value, but it was incidentally stated that it was of great value. Plaintiff introduced testimony as to the effect generally upon the mill of the removal of the machinery, and that defendant cut out some of the frames and timbers, tore up the mill in a general way, and nearly destroyed it so far as operating was concerned. *Held*, that the complaint stated a cause of action for an injury to real property within the rule that such actions are local, and not a cause of action to recover the value of personal property taken and converted by defendant, and, moreover, the action was tried as one for trespass to real property.

[As to jurisdiction of courts over transitory causes of action, see note in 59 Am. St. Rep. 869.]

Courts—Jurisdiction—Waiver by Failure to Demur.

5. Under Section 72, L. O. L., providing that, if no objection be taken either by demurrer or answer, defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state a cause of action, an objection to the court's jurisdiction of an action for injuries to real property in another state was not waived by the failure to demur to the complaint, but might be raised at any time.

Courts—Jurisdiction—"Circuit Court."

6. Under the constitutional provision investing the Circuit Courts with general jurisdiction to be defined, limited and regulated by law, such courts are common-law courts, and any extraordinary jurisdiction not in the course of the common law must come from either the Constitution or the statutes.

Judgment—Conformity to Pleadings.

7. In an action for an injury to real property by removing machinery from a sawmill, plaintiff cannot recover for the taking and conversion of personal property.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE McBRIDE.

This is an action by the Montesano Lumber Company, a corporation, against the Portland Iron Works, a corporation, for damages begun in the Circuit Court of Multnomah County upon a complaint, the material portions of which, after setting up the fact that the plaintiff is a corporation organized and existing under the laws of Washington, and that defendant is an Oregon corporation, may be stated as follows:

“That at all of the times herein mentioned the said plaintiff has been and it now is the owner of a certain sawmill and sawmill site, hereinafter more particularly mentioned and described, and located in the county of Chehalis and State of Washington, and immediately to the south of the City of Montesano, in said county, and that on the eighteenth day of May, 1911, and prior thereto, there was located on the said premises a sawmill, with sheds and other buildings, and with various machinery incidental to the operation of a sawmill, and on the date last above mentioned the said plaintiff made and entered into a contract and lease with J. W. Sumrall, A. B. Crosier and A. K. Foss, wherein and whereby the said plaintiff did lease and let unto the said Sumrall, Crosier and Foss the said premises for a period of three years, and under the terms of the said instrument the said lessees agreed to purchase and install on the said premises certain valuable machinery, tools, implements, and appliances therein particularly mentioned, *and that the said machinery, etc., when so established, should be and become a part of the said realty and a part of the said sawmill and the property of the said plaintiff; and a copy of which said contract and lease is hereunto attached, marked Exhibit 'A' and made a part hereof; that very shortly after the execution of the said lease, the said lessees, by and with the consent of the said plaintiff, sold and assigned said lease to the Montesano Mill Company, a corporation under the laws of the State of Washington.*”

In paragraph 3 it is asserted that:

The Montesano Mill Company, which for the purpose of avoiding confusion of names we will hereinafter style the tenant, "for the purpose of complying with the terms and provisions of said lease, * * purchased of defendant certain machinery, tools, implements, and appliances mentioned and described in the said lease [here follows a detailed list of the machinery, being identical with that which by the terms of its lease the tenant was obliged to place in the mill], all of which were of great value; *that during the late spring or early summer of 1911 the said machinery, tools, and implements and appliances were by the said defendant sold and delivered to the said Montesano Mill Company, and the same was thereafter by the said company duly installed in the said mill and became a part of the said mill and mill plant and affixed and attached thereto.*"

Paragraph 4 alleges a forfeiture of the lease.

Paragraph 5 is as follows:

"That on or about the — day of —, 1913, the said defendant, acting by and through its officers, agents and employees, did unlawfully and wrongfully, and against the wishes and protests of the said plaintiff, *enter in and upon the aforesaid mill premises, and did unlawfully, and against the wishes and protests of the said plaintiff, tear down and dismember the said sawmill, and took therefrom the machinery, tools, implements, and appliances which it, the said defendant, had theretofore sold and delivered to the said Montesano Mill Company, and which the last-named company had long theretofore had installed in said mill, and which machinery, tools, implements, and appliances were at the time of the unlawful action of the said defendant, necessary for the operation of such mill, and the said defendant after having dismantled the said mill and torn and taken therefrom a large amount of the machinery, tools, implements and appliances, did take away to places to the plaintiff unknown*

all such machinery, tools, implements and appliances, all of which was done by the said defendant wrongfully and unlawfully and against the express wishes and protests of the said plaintiff."

The sixth paragraph states:

"That by the unlawful and wrongful action of the said defendant the said sawmill and sawmill plant of the plaintiff was made useless and worthless, and it has been impossible to operate the said sawmill because of the action of the said defendant, and the machinery, tools, implements and appliances which the said defendant left in and about the said mill were useless and practically without value, and that by the wrongful and unlawful action of the said defendant as aforesaid the said plaintiff has been damaged in the sum of \$10,000."

Defendant answered, admitting its corporate existence and the ownership by plaintiff of the sawmill and site at Montesano, and denied every other allegation of the complaint. By way of further defense it alleged that in the months of May and June, 1911, it agreed to sell to the tenant the property described in the complaint by a conditional bill of sale. The substance of the conditional bill of sale was that the defendant should retain the ownership of the machinery until paid for, and it is in the usual form of such instruments. The answer alleges that the tenant has never paid for the machinery so delivered to it; that defendant did not have any notice or knowledge of the terms of the lease between plaintiff and its tenants until long after the conditional bill of sale was executed; that the conditional bill of sale recited that the tenant was a corporation residing at the City of Montesano, county of Chehalis, and State of Washington; that the principal place of business of plaintiff is in Montesano, Washington; that plaintiff did not enjoin nor attempt

to prevent defendant from running said property; that the same was never in possession of plaintiff, and was removed with its consent; that the tenant ordered to the mill in machinery and other improvements property which cost it more than \$18,000. The plaintiff replied to the new matter in the answer by admitting that defendant, at or about the date mentioned in the complaint, did enter into some kind of a contract for the sale of certain sawmill machinery; that said contract was recorded in the office of the county auditor of Chehalis County, Washington; that such machinery was placed in the mill; and that it constituted a part or all of the machinery mentioned in the alleged conditional sale contract. The following allegations and denials then follow:

“That at the time of the giving of the lease mentioned in the complaint herein the said sawmill plant had in it a large amount of regularly installed machinery ready and prepared for operation; that when the said Montesano Mill Company undertook to install the new machinery provided for in the said lease and particularly the machinery removed by the defendant, the former machinery in the mill was readjusted, parts of it removed, thrown aside, and torn to pieces, in order to install and put in operation such new machinery; that the said Montesano Mill Company, under and by virtue of the provisions of the said lease, and for the purpose of complying with the terms thereof, obtained from the said defendant the machinery, tools, implements and appliances mentioned and described in the complaint herein, and the same were installed in the plaintiff's said mill and mill premises and became a part of the fixed and stationary property of the said mill and mill property; that under and by virtue of the terms of the said lease, when the said machinery, etc., was installed, it became and remained the property of the said plaintiff; that under and by virtue of Section 3679 of Volume 2, Remington & Ballinger's Annotated

Codes and Statutes of the State of Washington, being a part of the statutes and laws of the State of Washington, it is provided, among other things, that persons desiring to form a corporation under the laws of the State of Washington shall make, execute and acknowledge, in triplicate, written articles of incorporation, one copy of which shall be filed with the Secretary of State of Washington, another copy of which shall be filed with the County Auditor of the county in which the principal place of business of the corporation is intended to be located, and the third copy to remain in the possession of the corporation, and which said statute further provides that the articles of incorporation shall state, among other things, 'the name of the city, town or locality and county in which the principal place of business of the company is to be located'; that the articles of incorporation so executed and filed by the said Montesano Mill Company expressly provided that its principal place of business was the City of Seattle, county of King, and State of Washington; that the only conditional sale contract or any written contract made as alleged in the answer or otherwise between the defendant and the said Montesano Mill Company concerning the sale and purchase of the said machinery was filed with the auditor of Chehalis County, and that no such instrument was at any time within the time provided by the laws of the State of Washington filed or recorded in the office of the auditor of the said King County, which was the principal place of business and residence of the said Montesano Mill Company; that Sections 3670 and 3671 of Volume 2 of the said Remington & Ballinger's Annotated Codes and Statutes of the State of Washington are with reference to the execution and filing of conditional sale contracts such as is pleaded in the answer herein, and which said Section 3670 is in the words and figures following, to wit: 'All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to purchasers, encumbrancers and subsequent creditors in

good faith, unless within ten days after taking possession by the vendee a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein at the date of the vendee's taking possession of the property the vendee resides'— * * that the Supreme Court of the State of Washington, which is the highest court of the said state, has by its decisions heretofore rendered decided that the residence of a corporation under the provisions of the said Section 3670 is the city and county named in the articles of incorporation of such company as its principal place of business; that the said plaintiff at the time of the purchase and installation of the machinery mentioned and described in the complaint here had no knowledge whatsoever that the said Montesano Mill Company had purchased the said property upon a pretended or other manner of conditional sale, and the plaintiff never obtained any knowledge that the said defendant claimed that the said machinery was sold under conditional sale until long after the installation of the said machinery and long after the time provided by the statutes aforesaid of the State of Washington for the filing of such conditional sale contract; that if the machinery described in the complaint herein was sold upon a conditional sale contract, as alleged in the answer, the same was and is void as against this plaintiff, and as against this plaintiff and the defendant the plaintiff becomes the absolute owner of the said machinery, tools, implements, and appliances immediately upon the installation thereof in the said sawmill."

Upon the trial the court instructed the jury to find for the plaintiff for the reasonable value of the machinery taken, and thereupon there was a verdict and judgment in its favor for the sum of \$2,963, from which defendant appeals.

DISMISSED. REHEARING DENIED.

For appellant there was a brief over the names of *Messrs. Wilson, Neal & Rossman* and *Mr. George F. Hopkins, Jr.*, with an oral argument by *Mr. A. King Wilson*.

For respondent there was a brief over the names of *Messrs. Bridges & Bruener* and *Messrs. Teal, Minor & Winfree*, with an oral argument by *Mr. J. G. Bridges*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1, 2. Many specifications of error are assigned in the abstract, but only three are specified or discussed in the brief or at the hearing, and we shall therefore treat the others as waived. It is admitted that the laws of the State of Washington require that articles of incorporation shall specify the name of the city, town or locality in which the principal place of business of the company is to be located, and it is shown that the articles of the defendant's vendee so specified Seattle, in King County. It also appears that the Supreme Court of Washington has decided that the residence of a corporation is the city and county named in the articles of incorporation as its principal place of business. It is shown the laws of Washington require that all conditional sales of personal property, or leases thereof containing a conditional right to purchase when the property is placed in the possession of the vendee, shall be absolute to purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after the taking of possession by the vendee a memorandum of such sale, stating its terms and conditions, shall be filed in the auditor's office of the county wherein at the date of vendee's taking possession of the property the vendee resides. It is

also apparent that the conditional bill of sale was never recorded in King County, the vendee's legal residence, but was recorded in Chehalis County, where the mill was situated. From these facts it follows that, if plaintiff is a purchaser in good faith, the conditional bill of sale is void as to it, and it was the owner of the machinery at the time of defendant's alleged trespass. It is our opinion that the title to the property vested in plaintiff the moment it was installed in the mill. There was no constructive notice arising from the recording of the bill of sale in the wrong county, and there is no evidence that plaintiff had any actual notice of the conditional character of the transaction until nearly a year after the machinery was installed. The purport of the lease is that the lessee shall pay \$300 per month as rent for the mill, that \$10,000 shall be paid in advance in machinery and equipment to consist of certain articles specified in the lease, and that upon the installation of such machinery and equipment it shall be and become the property of the lessor. Aside, therefore, from the question of whether or not the machinery was so permanently attached to the building as to become a fixture, and consequently a part of the realty, it became plaintiff's property by the terms of the lease. Plaintiff was a purchaser within the meaning of the statute quoted. The consideration paid was the giving of the lease and putting the lessee into possession of a valuable mill.

3. So far, then, plaintiff has shown a right to recover damages unless defendant's contention that this is an action to recover for injuries to real property has been sustained. It is the almost universal holding in this country that an action for trespass on real property is local, and can be maintained only in the state or county where the injury occurred, and that a court

foreign to the place of injury is without jurisdiction to determine such a controversy. Such was the common-law rule as is conclusively demonstrated in the opinion of Lord Chancellor Herschell in the great case of the *British South Africa Co. v. Companhia de Mocambique*, [1893] App. Cas. 602, where the whole subject was thoroughly gone over in view of supposed changes made by the English reformed procedure. In the United States the holding to the same effect has been almost unanimous. *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105 (39 L. Ed. 913, 15 Sup. Ct. Rep. 771), was a case practically coinciding with the case at bar. The complaint alleged that on January 1, 1875, and on divers other days, etc., sundry persons, knowing the land and timber thereon to be the plaintiff's property, without any right or authority from him, and at the instance and for the use and benefit of the defendant, cut down, removed and sawed into logs a large quantity of the timber, and the defendant, knowing the logs to be cut from the land, and both land and logs to be Bailey's property, took the logs into its possession and converted them to its own use. There was no demurrer or plea to the jurisdiction, and an answer was filed to the merits, but thereafter the court ordered that the action be abated and stricken from the docket. Upon the appeal Justice GRAY said:

"Various grounds taken by the defendant in error in support of the judgment below need not be considered, because there is one decisive reason against the maintenance of the action. By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the state in which the land lies: *Livingston v. Jefferson*, 1 Brock. 203 [Fed. Cas.

No. 8411]; *McKenna v. Fisk*, 1 How. 241, 247 [11 L. Ed. 117]; *Northern Indiana R. R. v. Michigan Central R. R.*, 15 How. 233, 242, 251 [14 L. Ed. 674]; *Huntington v. Attrill*, 146 U. S. 657, 659, 670 [36 L. Ed. 1123, 13 Sup. Ct. Rep. 224]; *British South Africa Co. v. Companhia de Mocambique*, [1893] App. Cas. 602; *Cragin v. Lovell*, 88 N. Y. 258; *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560 [23 N. E. 581, 6 L. R. A. 416]; *Thayer v. Brooks*, 17 Ohio, 489, 492 [49 Am. Dec. 474]; Kinkead's Code Pleading, § 35. The original petition contained two counts, the one for trespass upon land and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not: *McKenna v. Fisk*, above cited; *Williams v. Breedon*, 1 Bos. & P. 329. But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only, and could not, therefore, be maintained by proof of the conversion of personal property without also proving the trespass upon real estate: *Cotton v. United States*, 11 How. 229 [13 L. Ed. 675]; *Eames v. Prentice*, 8 Cush. [Mass.] 337; *Howe v. Willson*, 1 Denio [N. Y.] 181; *Dodge v. Colby*, 108 N. Y. 445 [15 N. E. 703]; *Merriman v. McCormick Co.*, 86 Wis. 142 [56 N. W. 743]. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The Circuit Court of the United States sitting in Ohio had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea: *British South Africa Co. v. Com-*

panhia de Mocambique, [1893] App. Cas. 602, 621; *Weidner v. Rankin*, 26 Ohio St. 522; *Youngstown v. Moore*, 30 Ohio St. 133; Ohio Rev. Stats., § 5064."

Other cases to the same effect are *Du Breuil v. Pennsylvania Co.*, 130 Ind. 137 (29 N. E. 909); *Brown v. Irwin*, 47 Kan. 50 (27 Pac. 184); *Morris v. Mo. Pac. Ry. Co.*, 78 Tex. 17 (14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349); *Hill v. Nelson*, 70 N. J. Law, 376, (57 Atl. 411); *Karr v. N. Y. J. F. Co.*, 78 N. J. Law, 198 (73 Atl. 132); *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560 (23 N. E. 581, 6 L. R. A. 416); *Smith v. Southern Ry. Co.*, 136 Ky. 162 (123 S. W. 678, 26 L. R. A. (N. S.) 927). In a note to the latter case, as reported in L. R. A., is found cited a great number of authorities holding the views above indicated; and, since the common law prevails in this state, except where modified by statute or unadapted to our conditions, which is not the case here, we feel constrained to follow this construction. A contrary view is taken by the Supreme Court of Minnesota in *Little v. Chicago etc. Ry.*, 65 Minn. 48 (67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423). The opinion is strong and plausible, but it is by a divided court, and the dissenting opinion by Justice BUCK, presenting strong and cogent reasons why the rule of the common law should be adhered to, among other things, observes:

"As a matter of policy, citizens of other states should not be permitted the use of our courts to redress wrongs and injuries to real property committed within their own territory. That is not what our courts were created or organized for. Nonresidents should not be invited to bring to our courts litigation arising over injuries to real property outside of our territorial limits. Certainly there is nothing in our Constitution or laws which justifies them in imposing the burden of maintaining courts at our expense for

their use and benefit. Protection of our own citizens is the primary object and duty of our own courts, and it is, to say the least, a very generous and liberal interpretation of the law which accords to suitors residing in other states the right to litigate in our courts questions of injury to real estate there situate, while the courts of those states reject the claim of our own citizens to litigate there injury to real estate situate here, notably the adjoining State of Wisconsin, which adjoins our state, and where the subject matter of this litigation is situated. It is clearly against our interests that those living in the State of Wisconsin near the division line should be encouraged in this class of litigation because our laws may be more favorable as to the rules of evidence, or for any other cause, and thus necessitate taxation of our people that nonresidents may have a forum to litigate that which ought to be, and is, a local action in the State of Wisconsin. Our citizens have no such right in the courts of Wisconsin. Comity should be reciprocal, and this can be more properly obtained by legislative enactments of the respective states than by an interpretation in direct conflict with the almost universal judicial decisions elsewhere. But I should seriously doubt the wisdom of any such enactment. It might, perhaps, prevent the miscarriage of justice in some cases, but it would aid such miscarriage in many instances."

Further on in the opinion the same justice observes:

"Again, suppose the courts of California should adopt the doctrine of the majority opinion, and one of our citizens should visit that state for pleasure, health, or business, and is there sued by someone claiming that lands belonging to him situate here have been damaged by such citizen of Minnesota, would it not seem a miscarriage of justice that the trial in such case must take place thousands of miles away from the man's home, and from the situs of the property alleged to have been injured? The hardship of such a proceeding would seem to be intolerable, and I can-

not give my assent to any such doctrine, whatever may be the rule as to the trial of actions upon voluntary contracts between parties; and I prefer that the rule should be that for injuries to real property the jurisdiction of our courts should only be coextensive with its territorial sovereignty."

In short, there is no such preponderance of calamities arising from adherence to the common-law rule as would justify this court in judicially repealing it. Once the bars are let down citizens of New York temporarily sojourning in Portland may litigate in our courts and at the expense of our taxpayers causes of action for injuries to real property situated in their home state just as a citizen of Minnesota could, under the case above cited, sue a citizen of Oregon passing through St. Paul on his way East for injuries to real property situated in Portland, and compel him to bring his witnesses many hundred miles to defend. The fact generally is that witnesses to injuries to real property must usually be obtained in the vicinity of the place where the injury occurred, and such locality is therefore the natural and logical place for trial. Instances may occur where a person having no property in a state may commit an injury to real property therein and leave the state, thereby defeating a recovery, but it is rarely the case that serious injury may be perpetrated with such expedition and secrecy as to prevent an action being begun and service of summons upon him. The present case is a fair illustration of this. The defendant went openly and consumed several days in taking the machinery out of the mill. The plaintiff was there and knew defendant was removing it, and could have enjoined it before any great damage had been done, or could have replevined the machinery before it was shipped; but, instead of

doing this, it contented itself with serving a written protest and permitted the spoliation to go on. If it slept on its rights, it should not now be heard to complain that it has lost its remedy, which as we shall presently show, it has not so far as an action of trover will give it a remedy.

4. In this connection we will consider the contention of plaintiff that this is not an action for injury to real property, but to recover the value of personal property taken and converted by defendant. It may be premised that every complaint must proceed upon a theory and must be good upon that theory, or it will be insufficient, and no recovery can be had upon a theory different from that upon which the pleading is framed: 31 Cyc. 116. This complaint is founded upon the theory that the machinery was by the terms of the lease to become part of the mill, and therefore realty, and that it was actually so attached as to become realty, in consequence of which plaintiff's damage, considered as a whole, comes about because the mill is rendered less valuable in the sum of \$10,000 by reason of plaintiff's trespass. There is no allegation that the machinery was of any particular value. It is incidentally said that it was of great value, which is a mere formal allegation and might mean \$5 or \$10,000. Such an allegation in an action of trover might be good after verdict, but it is usual in such an action for the complaint to state the reasonable value of the goods converted, and its absence, taken with the other allegations hereinafter noticed, tends to show the theory upon which the complaint is drawn. We have italicized certain allegations of the complaint and reply which further serve to characterize the complaint as an action for trespass *quare clausum fregit*.

Thus it is alleged that the agreement with the tenant was:

“That the said machinery, etc., when so established, should be and become a part of the said realty and a part of said sawmill and the property of the said plaintiff; * * that the same was thereafter by the said company duly installed in the said mill and became a part of the said mill and mill plant and affixed thereto.”

It is further alleged therein:

That the defendant did wrongfully and unlawfully “tear down and dismember the said sawmill and took therefrom the machinery, tools, and appliances,” etc.

It is also stated:

That by said wrongful action “the said sawmill and sawmill plant of plaintiff was made useless and worthless, and it has been impossible to operate the said sawmill because of the action of the said defendant, and the machinery, tools, implements and appliances which the said defendant left in and about the said mill were useless and practically without value, and that by the wrongful and unlawful action of the said defendant as aforesaid the said plaintiff has been damaged in the sum of \$10,000.”

Now, if this does not state a plain cause of action for ruining a mill by tearing out machinery which was so attached as to form part of the realty, and thereby rendering the mill useless, it would be difficult to frame a complaint that would state such a cause of action. In what way was plaintiff damaged? The answer is, by defendant rendering its mill useless. How did defendant render the mill useless? The reply follows, by tearing out and removing machinery attached to and part of the realty, so that it could no longer be operated. The complaint here states a much stronger case of trespass *quare clausum fregit* than the case of

Ellenwood v. Marietta Chair Co., 158 U. S. 105 (39 L. Ed. 913, 15 Sup. Ct. Rep. 771). As showing the theory upon which the case was tried, it may be observed that plaintiff introduced testimony as to the effect generally upon the mill as such by reason of the taking out of the machinery, and plaintiff's witnesses averred that in removing it defendant cut out some of the frames and some of the timbers, tore up the mill in a general way, and, in fact, nearly destroyed it so far as operating was concerned. It is plain that up to the time the court instructed the jury the case was presented and tried as a case of trespass upon real property. We conclude, therefore, that the case, both upon the pleadings and upon the theory upon which the evidence was introduced, was one for injury to realty, and therefore beyond the jurisdiction of the court to try.

5, 6. It is claimed, however, that the jurisdictional question was waived by the failure to demur to the complaint. Section 72, L. O. L., provides:

"If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

So that, where the complaint shows, as it does here, a case without the jurisdiction of the court to try, that fact may be raised at any time. Under the common law, as shown, the court had no jurisdiction to try a case of this character, and there is no statute granting that jurisdiction. Our Constitution invests the Circuit Courts with general jurisdiction "to be defined, limited, and regulated by law." They are common-law courts, and any extraordinary jurisdiction not in

the course of the common law must come from either the Constitution or the statutes. The only statute defining, limiting or regulating their jurisdiction in actions regarding real estate is Section 42, L. O. L., which, among other things, provides that an action for injuries to real property shall be commenced and tried where the property is situated. This section is both a definition and a limitation of the jurisdiction of the courts of this state in reference to the trial of this class of actions; the subject matter, the real property injured, must lie within the boundaries of the county where the action is commenced, and the fact that the section quoted makes no provision for the venue of such cases where the injury occurred in another state. is in itself a tacit recognition of the common-law rule heretofore discussed. In Bliss on Code Pleading, Section 406, in discussing the objection "that the court has no jurisdiction over the subject of the action," it is stated that it is a fatal objection, and cannot be waived by the party, but may be raised at any stage of the proceedings, and, after giving several instances where this defect arises, the author says:

"But this want of jurisdiction will more commonly appear in local as distinguished from transitory actions."

Sentenis v. Ladew, 140 N. Y. 463 (35 N. E. 650, 37 Am. St. Rep. 569), is cited by plaintiff as holding a contrary doctrine. While there are expressions in the opinion which indicate the court was of the opinion that jurisdiction had been waived by the defendant's having answered to the merits, the question was not directly involved. In that case the plaintiffs had brought an action in New York for trespass to land situated in Tennessee. When the case was called for

trial, the plaintiffs failed to appear, and a large sum was assessed against them as costs. They then appeared and moved to set aside the judgment for costs on the ground that the action which they had instituted was local, and that the court had, therefore, no jurisdiction to award costs against them. Among other things the court said:

“We entertain no doubt that the Supreme Court had jurisdiction to render the judgment awarded in this action. Under the Constitution it has general jurisdiction in law and equity, and of the class of actions to which this cause belongs. It is not prohibited by any statute from entertaining jurisdiction of a suit for damages for injuries to real property in another state. As was stated by Judge Earl in *Cragin v. Lovell*, 88 N. Y. 258: ‘It is a general rule of law that actions for injuries to real property must be brought in the *forum rei sitae*, and this rule of law has been, so far as I can discover, uniformly sanctioned and upheld in this state.’ But a party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and having once done so, he cannot subsequently invoke its protection: *Lee v. Tillotson*, 24 Wend. 337 [35 Am. Dec. 624]; *Embury v. Conner*, 3 N. Y. 511 [53 Am. Dec. 325]; *In re Cooper*, 93 N. Y. 507. If the court acquires jurisdiction of the persons of the parties by due personal service of process, or by their voluntary appearance and submission to its jurisdiction, and the defendant makes no objection to the authority of the court to hear the cause, and the parties proceed to a trial upon the merits, the judgment rendered would be neither void nor voidable for want of jurisdiction, but would be binding and conclusive upon the parties. * * It would be an intolerable abuse of the process of the court if the plaintiff could be permitted to select his tribunal and summon his adversary before it, and,

when defeated in the cause, be heard to say that the action was not cognizable by the court, and that the judgment which it had rendered was a nullity. It might be different if the court was one whose jurisdiction was expressly limited by statute, or there was some statutory inhibition of jurisdiction in a given case or class of cases. Then consent even might not confer jurisdiction."

The court was right in requiring the plaintiff to pay costs, but the result of its opinion, viewed apart from the concrete case there presented, would permit two citizens of Great Britain to litigate in New York concerning the rights of property situated in Germany. This might be vastly convenient just at present, but it is submitted that would be rather a severe tax on the comity of courts. The holding is directly contrary to the view taken by the Supreme Court of the United States in *Sentenis v. Ladew*, 140 N. Y. 463 (35 N. E. 650, 37 Am. St. Rep. 569), which case we are disposed to follow.

7. We do not wish to be understood as holding that the plaintiff cannot recover in the courts of this state in an action for the trover and conversion of the machinery removed. We think the better authorities indicate that it can: *Stone v. United States*, 167 U. S. 178 (42 L. Ed. 127, 17 Sup. Ct. Rep. 778); *McGonigle v. Atchison*, 33 Kan. 726 (7 Pac. 550). What we do decide is that a party cannot bring an action to recover damages for injury to real property and recover for the taking and conversion of personal property.

The action will be dismissed without prejudice.

DISMISSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Argued September 28, reversed November 9, 1915.

COOPER v. HILLSBORO GARDEN TRACTS.*

(152 Pac. 488.)

Pleading—Complaint—Sufficiency.

1. Where no objection to the sufficiency of the complaint is made until the introduction of evidence, it is entitled to all the intendments in its favor, which could be invoked after a decision on the merits of the controversy.

Pleading—Complaint—Sufficiency—Objection to Evidence.

2. In a suit to rescind a contract for the purchase of land on the ground of misrepresentations, the complaint, which in addition to a detailed specification of the statements made by defendant averred that they were false and known to be false at the time made, that they were made for the purpose of inducing the plaintiff to purchase the land, and that plaintiff entered into the agreement relying on the representations, and would not have done so had he known their falsity, is sufficient, when not attacked until the introduction of evidence, though not specifically pointing out wherein the representations were untrue.

Vendor and Purchaser—Remedies of Purchaser—Right to Rescind.

3. Where plaintiff, after discovering the falsity of the representations by which he was induced to purchase land, remained in possession for a number of months and then leased the premises before beginning suit, his delay was an affirmation of the contract precluding rescission.

[As to forfeiture of vendee's rights, see note in 31 *Am. Dec.* 278.]

Assignments—Validity of Assignments.

4. A mere litigious right cannot be assigned; consequently one purchaser of land cannot assign to another the right to sue for a rescission of the contract.

Assignments—Contracts.

5. Where purchasers of land assigned their contracts to plaintiff, the assignment was an affirmation of the agreement, and so precluded suit by plaintiff for rescission of the contracts on the ground of misrepresentations; plaintiff having no more rights than his assignors.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

McLain Cooper seeks to cancel 10 land contracts, only one of which was made with him, while the others

*On waiver of purchaser's right to rescind, see note in 30 *L. E. A.* (N. S.) 872. REPORTER.

were signed by different persons. The Hillsboro Garden Tracts, a private corporation, paid \$85,000 for 473 acres of land, known as the Connell farm, and then platted and subdivided most of the property. Fifty or 60 acres of the tract are located within the city limits of Hillsboro and close to the courthouse; and the remainder lies just beyond the municipal boundaries. The contracts were all signed by the defendant, but the execution of them was brought about through the agency of either the Ada Land Company or the Smith-Willoughby Company, real estate brokers, with whom the land had been listed.

On February 12, 1912, defendant agreed to sell, and the plaintiff agreed to purchase, lots 39 and 40 in block 18, Garden Tract addition to Hillsboro, and tracts 7 and 8 in block 4 of Hillsboro Garden Tracts for \$3,256.50 of which \$825 was paid at the time of entering into the agreement, entitling the plaintiff to take possession of the land, and the balance of the purchase price was to be paid in specified installments. Contracts which were identical in terms with the one signed by the plaintiff, except as to the description of the land and the price to be paid, were made by the defendant on April 1, 1912, with Fred E. Koch; on April 15, 1912, with Fred E. Koch; on March 28, 1912, with Wm. Rose; on April 23, 1912, with J. E. Rose; on July 5, 1912, with J. B. Wirz and S. R. Wirz; on March 1, 1912, with J. A. Johnson; on March 1, 1912, with Edward L. Johnson and Ray Pierson; on March 16, 1912, with E. Seidel, and on July 30, 1912, with Frank A. Smith. Payments were made on the several agreements, and improvements were placed upon each tract of land except the properties described in the writings signed by J. E. Rose and Frank A. Smith and the one executed by Fred E. Koch on April 15, 1912. On April

28, 1913, Fred E. Koch transferred both of his contracts to the plaintiff by executing assignments, one of which reads:

"I, Fred E. Koch, the party of the second part in the within contract, for and in consideration of one dollar and other valuable consideration to me in hand paid, the receipt whereof is hereby acknowledged, do hereby sell, assign and convey unto McLain Cooper of Hillsboro, Oregon, all my right, title and interest in, to and under the said within contract, including all rights of action or otherwise, to me accrued or hereafter to accrue thereunder, together with all other rights of whatever nature or kind under said contract, in connection therewith or in the making thereof."

Similar assignments were made by Wm. Rose and E. Seidel on April 28th; by Edward L. Johnson and Ray Pierson on April 30th; by J. A. Johnson on May 2d; by J. E. Rose on May 3d; and by the Wirzs and Frank A. Smith on May 5th.

On May 19, 1913, the plaintiff tendered to the defendant his individual contract, as well as the nine agreements which had been assigned to him, together with a quitclaim deed to the land embraced within the 10 writings, and demanded that the defendant return to him all the payments made on the several contracts, and that the Hillsboro Garden Tracts make reimbursement for the improvements placed upon the properties. The defendant refused to comply with the demand, and thereafter the plaintiff commenced this suit for the purpose of rescinding the written agreements and recovering the installments paid and the value of the improvements made by the contracting purchasers.

The complaint contains 10 causes of suit, the first of which is based upon the contract made between the plaintiff and defendant. It is alleged that for the purpose of inducing the plaintiff to enter into the agree-

ment, the defendant falsely represented to him that, if he would enter into the contract, the defendant would furnish employment to him during the summer, fall and winter of 1912 in making improvements upon the streets and roads on and adjacent to the property owned by defendant; that the defendant would immediately begin the grading and clearing of streets in and about its property; that it would lay cement sidewalks; that it would erect 17 houses, would build three bridges over McKay Street, would erect a sawmill, and would give plaintiff employment upon all these improvements; that plaintiff could have the privilege of cutting cordwood from the timber; that the defendant would furnish to plaintiff all the work he could do at the rate of \$2.50 per day and at the rate of \$6 per day for a man and team—all of which would enable the plaintiff to earn a large part of the purchase price to be paid by him. It is further alleged that the defendant represented that the lots and tracts were beaver dam lands and very fertile; that the defendant would furnish and operate daily and in season a vegetable car between Hillsboro and Portland; that the World's Keep Fresh Company consisted largely of the stockholders of the defendant; and that it was establishing a preserving plant in the City of Hillsboro for the preserving of vegetables and fruits. The complaint also charges that one Summerland, who was in the employ of defendant, was introduced to plaintiff under the name of Thompson, and that in the presence of Cooper and for the purpose of baiting him, Summerland pretended to pay defendant \$500 as part payment of certain lots near the ones which plaintiff afterward agreed to purchase.

It is alleged in the second and third causes of suit that the defendant represented to Fred E. Koch that

it intended to and would immediately grade Jackson Street through its property, and would at once lay cement sidewalks along that street; that it intended to and would immediately grade Division Street and put Beaver road in first-class shape; that Fred E. Koch should have work in making these and other improvements on adjacent properties at the rate of \$2.50 per day, and that he would be enabled to earn money to make the payments provided for in his agreements; that the defendant was erecting 17 houses; that it would immediately construct a sawmill for the manufacture of timber on 60 acres of land belonging to it, and that Fred E. Koch should have employment in any of the work; that the defendant would run daily a vegetable car from Hillsboro to Portland, and would carry vegetables and berries at low rates; that the land was very fertile and, in the previous year, had yielded 75 bushels of wheat per acre; and that it was new land, having been cultivated two or three years.

The agreement with Wm. Rose furnishes the subject for the fourth cause of suit, and it is alleged that the defendant represented to him that Division Street would immediately be graded and cement sidewalks laid; that all the streets would be immediately grubbed out, graded up and good roads made; that the defendant had contracted for and would have built 17 houses and 3 bridges; that when Wm. Rose stated that he must have work if he bought any of the lots, the defendant represented that he could have all the work that he might desire, and that the defendant would put in one or two sawmills to cut the timber belonging to the Hillsboro Garden Tracts; that all the work would be done as rapidly as men could be procured to do the same; and that the defendant agreed that Wm. Rose

should have work as long as he wanted it from the defendant at \$2.50 per day.

The fifth cause of suit is based upon the contract with J. E. Rose, and it is alleged that the defendant represented to him that it would, and intended immediately, to grade Jackson Street, and that all the streets would be graded as rapidly as men could be procured to do the work; that 3 bridges and 17 houses would be erected on its property, and that J. E. Rose should have all the work he desired at the rate of \$2.50 per day in making the improvements mentioned and in working in the sawmill of defendant, which it said it would erect immediately.

The sixth cause of suit has to do with the contract made with J. B. Wirz and S. R. Wirz. The complaint avers that the defendant represented that it was having and would have a large amount of work done upon the streets and roads in its properties, and that the Wirzs would have employment from the defendant as long as they desired to work, at good wages.

The seventh cause of suit relates to the contract with J. A. Johnson, to whom it is claimed defendant represented that it was having and immediately would have built 3 bridges and several houses on its properties, and that the streets were to be graded and cement walks put down as far as the acre tracts; that the defendant had a large amount of stock in the World's Keep Fresh Company of Hillsboro, Oregon, which company would purchase all the vegetables and berries Johnson could produce; that the defendant would operate a vegetable car every day from Hillsboro to Portland and thus furnish a good market for such vegetables as Johnson might raise; that defendant told Johnson he could have work as long as he might desire it in making the improvements mentioned; that the

land agreed to be purchased by Johnson was all cleared and ready for the plow, although stumps and trees formerly on the land had been nearly burned down level with the ground and covered with earth.

The eighth cause of suit involves the contract made with Edward L. Johnson and Ray Pierson, to whom it is averred the defendant represented that it was having buildings erected upon its property, streets graded and sidewalks laid; that it would soon start a sawmill near by, and that the defendant would employ Johnson and Pierson in all or any of such work, and that they would thus have employment for some time.

The fraud relied upon in the ninth cause of suit arises out of the representations alleged to have been made to E. Seidel. The complaint states, further, that the defendant represented to him that it was having roads, bridges and sidewalks graded and constructed; that it was building and would immediately build 17 houses, stating that the contract had already been let for the houses; that the defendant would locate and operate a sawmill to cut timber belonging to the company; that the defendant would grade up the road to 4 feet in height and above the level of the water; that it would put in a new bridge; that upon all the work and improvements mentioned Seidel would be employed by the defendant for \$2.50 per day as long as he desired this work; that the World's Keep Fresh Company would purchase all the vegetables and berries he could produce on the land agreed to be purchased by him; and that the defendant would operate daily a vegetable car between Hillsboro and Portland, thus affording a market for such vegetables as he might grow.

The tenth cause of suit arises out of representations alleged to have been made to Frank A. Smith. The

plaintiff avers that the defendant stated to Frank A. Smith that it would immediately grade Jackson Street through its land and would lay cement walks on both sides of that street, that there was a good building site on the land agreed to be purchased by him, and that the defendant would grade a road to such land, thereby enabling Smith to pass in and out from his land at all seasons of the year; the defendant knowing, however, that the road for a long distance is annually under water for two or three months and is impassable for four or five months of the year. It is further claimed that the defendant represented to Smith that he could have employment upon the improvements being made and to be made for the defendant.

The answer denies all the accusations of fraud. As a defense to the first cause of suit the defendant alleges that Cooper leased the premises to J. W. Brown and placed him in possession; that the plaintiff had been collecting rents which he appropriated to his own use, and that he is not in a position to deliver possession of the land to defendant. As an affirmative defense to each of the remaining nine causes of suit the defendant alleges that the plaintiff is now, and has at all times mentioned in the complaint been, in possession of the premises, collecting the rent and profits therefrom and applying the same to his own use. The written contracts do not contain any of the alleged false representations relied upon by the plaintiff.

The trial resulted in a decree which cancels the 10 land contracts, awards plaintiff a judgment for \$2,403.75, the sums of money paid to defendant by plaintiff and his assignors, and for the additional sum of \$2,432.55, the value of the permanent improvements, together with costs and disbursements. The defendant appealed.

REVERSED.

For appellant there was a brief over the names of *Messrs. Huston & Huston, Mr. W. F. Magill and Mr. George W. Stapleton*, with oral arguments by *Mr. Samuel B. Huston and Mr. Oliver B. Huston*.

For respondent there was a brief over the names of *Messrs. Thacker & Hancock and Mr. George I. Brooks*, with an oral argument by *Mr. G. L. Thacker*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1, 2. This record presents a situation where the plaintiff seeks to rescind, not only his own contract to purchase land, but also to cancel nine similar agreements which had been executed by different persons and afterward assigned to him, predicating his prayer for relief upon representations which related either to the land itself, or to what the defendant would do, or the purchaser could do. The defendant interposes an objection at the very threshold of the inquiry; and the Hillsboro Garden Tracts contends that the complaint does not sufficiently plead fraud, and that therefore it is neither necessary to determine what representations were made by the defendant, nor to decide whether they are actionable. The essence of the argument is that the pleading does not point out wherein the representations were untrue, and that a mere narrative of the statements made by the defendant, when supplemented only by a general declaration of falsity, is not enough to sustain a decree, and does not measure up to the standard fixed in *Specht v. Allen*, 12 Or. 117 (6 Pac. 494); *Misner v. Knapp*, 13 Or. 140 (9 Pac. 65, 57 Am. Rep. 6); *Leasure v. Forquer*, 27 Or. 334 (41 Pac. 665); *Leavengood v. McGee*, 50 Or. 233 (91 Pac. 453); *McMillan v. Batten*, 52 Or. 218 (96 Pac. 675). The first

cause of suit is a fair example, and may be used as an illustration of all the causes of suit. In addition to a detailed specification of the statements made by the defendant the complaint in substance avers that the claims, statements and representations made by the defendant were false, and were well known to it, at the time when made, to be wholly untrue, and that the statements were made to the plaintiff for the purpose of deceiving, overreaching, and inducing plaintiff to purchase the land and to make the cash payment. The pleading also gives notice to the defendant that the plaintiff entered into the agreement because he believed and relied upon all the false statements, representations and promises made by the defendant, and that he would not have signed the contract nor made any payment had he not believed in and relied upon the representations, all of which were untrue, and known to the defendant to be false when made. The defendant did not attack the complaint by filing a demurrer, but contented itself by waiting until the trial had commenced, when an objection was offered to the introduction of testimony. The complaint might have been vulnerable to a demurrer if interposed before the commencement of the trial; but, no objection having been made until the introduction of testimony, the complaint must be liberally construed, and is entitled to all the intendments in its favor which could be invoked after a decision on the merits of the controversy: *Schoellhamer v. Rometsch*, 26 Or. 394 (38 Pac. 344); *Currey v. Butcher*, 37 Or. 380 (61 Pac. 631); *Creecy v. Joy*, 40 Or. 28 (66 Pac. 295); *Patterson v. Patterson*, 40 Or. 560 (67 Pac. 664); *Bade v. Hibberd*, 50 Or. 501 (93 Pac. 364); *Davis v. Mitchell*, 72 Or. 165 (142 Pac. 788); *Weishaar v. Pendleton*, 73 Or. 190 (144 Pac. 401); *Smith v. National Surety Co.*, 77 Or. 17 (149

Pac. 1040). The averment that the statements made by defendant were false and known to it to be wholly untrue was, in the absence of an objection by demurrer, sufficient notice to the defendant that the plaintiff would contend at the trial that the declarations made by the agents of the corporation were utterly untrue, and that the Hillsboro Garden Tracts made the representations for the purpose of deceiving the plaintiff, with the intention of not fulfilling any of them; and therefore the complaint is not fatally deficient.

3. The defendant contends that Cooper is precluded from rescinding the agreement. It will be recalled that the plaintiff entered into the land contract on February 12, 1912. Cooper immediately took possession of and occupied the property, and at once commenced to make improvements, the value of which the complaint asserts is \$1,435.85. The plaintiff says that about three weeks after he took possession he ascertained that some things were not as represented; that at the end of about three months, which would be in May or June of 1912, he told the defendant "that the matter had been misrepresented," and "denied nearly all of their representations, except what they represented to me what could be grown on the land, and I told him that I didn't know anything about that."

On August 28, 1912, Cooper and others addressed a communication to the Ada Land Company, requesting a statement "of the inducements and improvements of property the Ada Land Company offered to" them "if they would purchase land from the Ada Land Company."

On December 12, 1912, Cooper wrote a letter to the defendant, expressing a desire to lease $2\frac{1}{2}$ acres owned by the corporation and located near the land occupied by plaintiff. On April 23, 1913, Cooper

rented the land described in his contract to Wm. Hickethier for a period of one year, commencing with May 1, 1913; and on April 28th, five days afterward, four land contracts were assigned to the plaintiff for the purpose of enabling Cooper to commence this suit. It is true that the latter testified that he had made all arrangements for the commencement of this suit before entering into the lease with Hickethier, but the fact nevertheless remains that the lease was made before the complaint was filed. It must also be noted that in January, 1913, Cooper consulted with an attorney with reference to commencing a suit for the cancellation of his contract; and afterward, in September, 1913, he built a cow barn on the premises. Before signing the agreement with the defendant, Cooper went over the land and carefully examined it; he saw that water was over a portion of the premises; he could see that his land was "pretty near all on the hillside" and slopes down into the bottom; he observed that the land was new, had never been plowed, and he saw where stumps had been pulled out with a donkey. It is apparent from his own testimony that the plaintiff became aware of all the facts, except the fertility of the land, as early as May or June in 1912, and he certainly became aware of the quality of the land not later than the fall of that year; and, moreover, the overwhelming weight of the evidence establishes the fact that the soil is of an excellent quality. He admits that he consulted an attorney in January, 1913, with a view of rescinding, and yet in the following April he leased the land in dispute, and subsequently placed permanent improvements on the property. The delay on his part, together with his remaining in possession of the land and treating it as his own, evidence an intention to abide by the contract, and therefore he forfeited any

right to rescind the writing signed by him: *Scott v. Walton*, 32 Or. 460 (52 Pac. 180); *Vaughn v. Smith*, 34 Or. 54 (55 Pac. 99); *Elgin v. Snyder*, 60 Or. 297 (118 Pac. 280); *Van De Wiele v. Garbade*, 60 Or. 585 (120 Pac. 752); *Whitney v. Bissell*, 75 Or. 28 (146 Pac. 141, L. R. A. 1915D, 257); *Precious Blood Society v. Elsythe*, 102 Tenn. 40 (50 S. W. 759); *Bell v. Keepers*, 39 Kan. 105 (17 Pac. 786).

4, 5. The defendant challenges the right of Cooper to maintain a suit for the rescission of the land agreements which were assigned to him. It is a rule of general application that a mere litigious right cannot be assigned: 4 Cyc. 8, 13; 2 R. C. L., p. 612; *Gruber v. Baker*, 20 Nev. 453 (23 Pac. 858, 9 L. R. A. 302). Private contracts may usually be assigned (4 Cyc. 20); and, although it is frequently stated that the right to complain of fraud is not a merchantable commodity (*Tufts v. Matthews* (C. C.), 10 Fed. 611), nevertheless, a claim arising out of a tort affecting the estate of the assignor may be assigned, survivorship being the test of assignability (*Dahms v. Sears*, 13 Or. 47 (11 Pac. 891); *Sperry v. Stennick*, 64 Or. 96 (129 Pac. 130); *Zabriskie v. Smith*, 13 N. Y. 322 (64 Am. Dec. 551); *Graves v. Spier*, 58 Barb. (N. Y.) 349; 4 Cyc. 23; 2 R. C. L. 613; 2 Am. & Eng. Ency. Law, 1017, 1023). While the naked right to complain of a fraud may not be assigned separate and apart from a claim or thing having a legal existence and value owned by the assignor, nevertheless the assignment of the claim or thing owned generally carries with it all of the remedies which might have been available to the assignor: *Howd v. Breckenridge*, 97 Mich. 65 (56 N. W. 221). The case of *Sperry v. Stennick*, 64 Or. 96 (129 Pac. 130), furnishes an apt illustration of the assignability of a right of property, and similar exemplifications ap-

pear in *Graves v. Spier*, 58 Barb. (N. Y.) 349, and *Haight v. Hayt*, 19 N. Y. 465. There are numerous holdings to the effect that where, by means of fraudulent practices, A has been induced to convey his land to B, and afterward A deeds the same land to C, the latter may successfully maintain a suit against B for the annulment of the conveyance which was obtained by fraud; and many illustrations may be found in authoritative cases where the assignee of a claim may prosecute a suit to set aside a conveyance which was made for the purpose of defrauding creditors even though the deed was executed before the assignment of the claim. Examples of the first class may be found in *Dickinson v. Burrell*, L. R. 1 Eq. 337; *McMahon v. Allen*, 35 N. Y. 403; *Traer v. Clews*, 115 U. S. 528, (29 L. Ed. 467, 6 Sup. Ct. Rep. 155); *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261 (22 S. W. 623, 38 Am. St. Rep. 656), and in *Houston v. National etc. Loan Assn.*, 80 Miss. 31 (31 South. 540, 92 Am. St. Rep. 565). Illustrations of the second class appear in *Emmons v. Barton*, 109 Cal. 662 (42 Pac. 303), *National Valley Bank v. Hancock*, 100 Va. 101 (40 S. E. 611, 93 Am. St. Rep. 933, 57 L. R. A. 728), and *Howd v. Breckenridge*, 97 Mich. 65 (56 N. W. 221).

An analysis of *Sperry v. Stennick*, 64 Or. 96 (129 Pac. 130), and kindred cases and an examination of the other two classes of adjudications will at once reveal the fact that there the maintenance of a judicial proceeding, even though resting upon an accusation of fraud, is quite consistent with the act of assignment. When A conveys land to C, after having deeded the same land to B, the very act of making the conveyance to C is of itself a declaration that A refuses to abide by the transfer to B, where the latter employed fraud in procuring the land. It must be borne in mind, how-

ever, that this is a proceeding brought for the purpose of rescinding the transaction in its entirety and placing the parties, as near as the circumstances will permit, in the same positions they occupied before signing the agreement; and the plaintiff must, of necessity, accept one of two alternatives: Either, that the assignors parted with all their rights by making an absolute transfer of their entire interests in the contracts and in the lands; or else that the sole purpose of the assignment of the contracts was to enable Cooper to sue. When the assignments were made, not only Cooper, but the assignors, knew all that was known to them at the time of the trial; the contracts were transferred with full knowledge of the alleged fraud; and therefore the assignments of all the rights arising out of the contracts were themselves acts which affirmed rather than disaffirmed the agreements: *Scott v. Walton*, 32 Or. 460 (52 Pac. 180). If by affirming the contract the assignor waived his right to object, then Cooper cannot complain of any fraud practiced upon the assignor, because the plaintiff cannot have any greater right than was possessed by his assignor. Cooper cannot repudiate these land contracts if, with a knowledge of all the facts, the assignors affirmed them. If the plaintiff hangs his case upon the other horn of the dilemma—and he does, because he says in his brief that the “assignors of plaintiff assigned their interest in the lands for the purpose of bringing action and for the purpose of rescission”—then he is confronted with the rule that a mere naked right to sue for a fraud cannot be transferred alone and by itself: *Ryan v. Miller*, 236 Mo. 496 (139 S. W. 128, Ann. Cas. 1912D, 540); *Gruber v. Baker*, 20 Nev. 453 (23 Pac. 858, 9 L. R. A. 302). The plaintiff has, by his own conduct, waived any right to rescind his individual contract; and he cannot main-

tain this suit as assignee of the other contracts. The decree is reversed, and the complaint and suit are dismissed.

DISMISSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and
MR. JUSTICE BEAN CONCUR.

Argued September 28, reversed November 9, 1915.

MARSHALL v. HILLSBORO GARDEN TRACTS.*

(152 Pac. 493.)

Cancellation of Instruments—Complaint.

1. A complaint, seeking rescission of a contract for the purchase of land, which averred that plaintiff was induced to purchase by means of false representations, and recited the various false representations made, is sufficient where not attacked by demurrer.

Vendor and Purchaser—Rescission—Right to Rescind.

2. In a suit to obtain rescission of a contract for the purchase of land, evidence *held* to show that the only misrepresentations were as to matters of opinion.

Vendor and Purchaser—Contracts—Rescission—Right to.

3. A purchaser of land cannot rescind his contract on the ground that specific promises were not kept, where they were made in good faith and there was an attempt to keep them.

[As to liability of vendor for false representations innocently made, see note in *Ann. Cas.* 1913C, 63.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

This is a suit by W. E. Marshall against the Hillsboro Garden Tracts, a private corporation.

The plaintiff seeks to annul a land contract made with the defendant. On February 19, 1912, W. E. Marshall agreed in writing to purchase from the de-

*On future promises as fraud, see notes in 10 L. E. A. (N. S.) 640; 24 L. E. A. (N. S.) 735.

Statements regarding the future as fraud are discussed in note in 35 L. E. A. 420, 437.

REPORTER.

fendant the north half of tract 4, in block 8, of Hillsboro Garden Tracts, the purchase price being \$687.50, payable in installments. A payment of \$200 was made at the time of signing the contract. The plaintiff entered into possession of the premises and placed permanent improvements upon the land. On October 16, 1913, Marshall tendered his written contract to the defendant, offered to surrender all his interest in the land and betterments, and demanded a return of the \$200 paid on the purchase price, together with reimbursement for the permanent improvements. This suit was commenced after the defendant declined to accede to the demands made upon it.

The complaint alleges that the defendant, by means of false representations, induced Marshall to enter into the agreement. The pleading recites that defendant represented that Marshall could get employment from defendant at the rate of \$2.50 per day, and that there would be plenty of such work for plaintiff to do; that defendant would immediately grade the road along the west line of the tract, thereby providing drainage for the land; that defendant would grade Jackson Street and put down cement walks thereon at once; that the tract purchased by Marshall was all beaver dam land and very fertile, when in fact the land was very poor and does not grow good crops; and that there was wood enough on the tract to pay for the land, when in fact there was no marketable wood.

The answer denies the charge of fraud, and alleges that the plaintiff had been in possession of the premises, and had received and applied the rents and profits to his own use. The written agreement does not contain any of the representations recited in the complaint. The plaintiff obtained a decree canceling the contract and judgment, for the money paid on the pur-

chase price, and the value of the permanent improvements, aggregating \$305. The defendant appealed.

REVERSED.

For appellant there was a brief over the names of *Messrs. Huston & Huston, Mr. W. F. Magill and Mr. George W. Stapleton*, with oral arguments by *Mr. Samuel B. Huston and Mr. Oliver B. Huston*.

For respondent there was a brief over the names of *Messrs. Thacker & Hancock and Mr. George I. Brooks*, with an oral argument by *Mr. G. L. Thacker*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The defendant did not demur to the complaint, but waited until the trial had commenced, and at that time objected to the introduction of testimony. The ruling made on the sufficiency of the complaint in *Cooper v. Hillsboro Garden Tracts, ante*, p. 74 (152 Pac. 488), is applicable to and controls the instant case. The complaint is sufficient to withstand the attack of a belated objection.

2, 3. Attention will first be directed to the evidence. Concerning the promised employment, the plaintiff testified that the selling agent represented that:

"There would be work on these lots [meaning the platted lots and tracts]," and "he said there would be bridges and streets, and he said there would be work at \$2.50 a day, and this work was going to start just right away, and he said that he wanted to hurry and get the gardens in, to get them sold, as he wanted to start work on these improvements, as they would employ no one but the purchasers of the land, and we hurried, and that was the end of it."

It will be noted that the complaint alleges that the plaintiff could get employment, and that there would be plenty of work to do; but the evidence is not as broad as the complaint. It clearly appears that a bridge was built and work was done on streets, and the defendant did intend to give purchasers an opportunity to work on such improvements as might be made, before employing others. It is a fair inference from the testimony to say that at the time of entering into the contract, not only the defendant, but the plaintiff and other purchasers, believed that the future had much in store for them, and that their visions of prosperity faded only with the subsequent slump in real estate. There was an absence of intent not to make the improvements; and the defendant did intend to afford employment, although it did not accomplish all that was evidently expected.

Speaking of the road along the west line of his tract, Marshall said that the agent showed him "that road that they were going to put in there, the road that runs along my west line. He says: 'There is water on this land now, but when it is cleared up, you can drain that land in there'—it hasn't been drained yet, but it would drain when it was cleared up"—and "he said that they were going to drain it up."

It clearly appears that the defendant did not harbor any intention not to grade the road along the west line of the land because it did let a contract to G. Balliett and Fred Brethauer to clear out the street.

Continuing, the plaintiff explained the allegation relative to Jackson Street and the cement sidewalks, and stated that the selling agent pointed out some cement piled on Jackson Street, and declared "that they were going to build on Jackson Street. * * We

have the cement here and we are going to start this work just as soon as the weather will permit; we are going to grade the streets and put in the sidewalks."

While wooden, and not cement, walks were built, the defendant did intend, when it made the contract with plaintiff, to lay cement walks because the corporation did in fact let a contract for laying cement walks, although the contractor failed to make the improvement.

The plaintiff was first informed of the land by representatives of the Ada Land Company, who gave to Marshall some advertising circulars, and also told him that the land was of the kind known as beaver dam land. Afterward the plaintiff was shown, not only the tract described in the contract, but also other lots and tracts owned by defendant. Marshall testified that the agent, when speaking of the tract in controversy, declared that:

"This land here will grow onions, potatoes, beans, anything that you are a mind to put in it; anything will do well. It is the richest ground in the State of Oregon. You can grow anything, it don't matter what you put in the ground; it will produce a good crop."

The advertising literature placed in the hands of plaintiff contained a glowing word picture of Hillsboro Garden Tracts and fruit lands and, among other things, informed the reader that:

"Every foot of ground in the Hillsboro Garden Tracts is rich, virgin, fertile soil. It is very high in humus. Some of the tracts include beaver dam land."

It does not satisfactorily appear that the identical tract sold to the plaintiff was represented to him to be beaver dam land. The defendant had purchased a large body of land known as the Connell farm and subdivided it into lots and tracts. About 40 acres of the

farm is of the quality known as beaver dam. A portion of the tract purchased by plaintiff is heavy stump land, while "the west part of it is slough." Marshall made a personal inspection of the premises before entering into the agreement, and he saw what he was buying. The advertising circular which he relied upon informed him of the truth when Marshall read the statement, "Some of the tracts include beaver dam land." The plaintiff and other interested witnesses described the soil as being of poor quality, but every disinterested witness, including persons who had previously farmed the premises and who ought to know, testified that the land was good. There is no evidence to sustain the allegation that defendant said there was wood enough on the property to pay for it. When the allegations of the complaint are kept in close association with the evidence, it will be seen that the defendant did not make a single representation of an existing or past fact of which the plaintiff can complain; and all the other statements were only predictions, or were expressions of opinion, or were declarations of what the defendant would do in the future. The plaintiff cannot rescind his contract by predicating fraud upon an opinion or prediction. It is contended, however, that the defendant represented that specified things would be done in the future, and that the promises were not kept. There are numerous holdings to the effect that a mere promise, not made a part of an agreement, will not authorize a rescission, and that a representation must be of an existing or past fact; and this view is illustrated in the following adjudications: *People v. Healy*, 128 Ill. 9 (20 N. E. 692, 15 Am. St. Rep. 90); *Harrington v. Rutherford*, 38 Fla. 321 (21 South. 283); *Estes v. Desnoyers Shoe Co.*, 155 Mo.

577 (56 S. W. 316); *Huber v. Guggenheim* (C. C.), 89 Fed. 598; *Farris v. Strong*, 24 Colo. 107 (48 Pac. 963); *Day v. Ft. Scott Investment Co.*, 153 Ill. 293 (38 N. E. 567); *Balue v. Taylor*, 136 Ind. 368 (36 N. E. 269); *Love v. Teter*, 24 W. Va. 741; *Dawe v. Morris*, 149 Mass. 188 (21 N. E. 313, 14 Am. St. Rep. 404, 4 L. R. A. 158); *Perkins v. Lougee*, 6 Neb. 220; *Orr v. Goodloe*, 93 Va. 263 (24 S. E. 1014). There is also a line of cases announcing that a false promissory statement may furnish the foundation for rescission if the promise is coupled with a representation that a certain condition of things exists at the time, as in *Reagan v. Hadley*, 57 Ind. 509; *Banque v. Brown* (C. C.), 34 Fed. 162. Many authorities adhere to a more elastic rule and declare that the making of promises, with no intention to perform, constitutes fraud which will warrant a rescission. Fair exemplifications of this doctrine may be found in *Lawrence v. Gayetty*, 78 Cal. 126 (20 Pac. 382, 12 Am. St. Rep. 29); *Goodwin v. Horne*, 60 N. H. 485; *Piedmont Land Improvement Co. v. Piedmont, F. & M. Co.*, 96 Ala. 389 (11 South. 332); *Witt v. Cuenod*, 9 N. M. 143 (50 Pac. 328); *Langley v. Rodriguez*, 122 Cal. 580 (55 Pac. 406, 68 Am. St. Rep. 70); *Hodsden v. Hodsden*, 69 Minn. 486 (72 N. W. 562); *Troxler v. New Era Bldg. Co.*, 137 N. C. 51 (49 S. E. 58); *Ansley v. Bank of Piedmont*, 113 Ala. 467 (21 South. 59, 59 Am. St. Rep. 122); *Touchstone v. Staggs* (Tex. Civ. App.), 39 S. W. 189; *Rogers v. Virginia-Carolina Chemical Co.*, 149 Fed. 1 (78 C. C. A. 615); *Ivancovich v. Stern*, 14 Nev. 341; *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134 (110 N. W. 882, 10 L. R. A. (N. S.), 640); *Chicago etc. Ry. Co. v. Titterington*, 84 Tex. 218 (19 S. W. 472, 31 Am. St. Rep. 39). The intention not to keep the

promise furnishes the essence of the fraud in the last-mentioned class of cases; and therefore the logical conclusion is, if there was an honest intention to keep the promise, the agreement will not be canceled, even though the promise was not fulfilled: *State Bank of Indiana v. Gates*, 114 Iowa, 323 (86 N. W. 311). The evidence does not show that the defendant made any statements, alleged and relied upon in the complaint, of what it would do in the future with an intention, entertained at the time, not to do what it said it would do. The plaintiff is not entitled to rescind the contract, and the decree is therefore reversed. **REVERSED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BEAN concur.

Argued September 28, reversed November 9, 1915.

HENRICKSON v. HILLSBORO GARDEN TRACTS.

(152 Pac. 495.)

Vendor and Purchaser—Actions for Rescission—Evidence.

1. A purchaser of land is not entitled to a rescission of the contract on the ground of misrepresentations, where the misrepresentations consisted of mere opinions or predictions, or of promises which the vendor actually intended and attempted to fulfill.

Cancellation of Instruments—Actions—Evidence.

2. In a suit for rescission of a contract for the purchase of land on the ground of misrepresentations, relief cannot be afforded on account of misrepresentations not set up in the complaint.

[As to rescission or cancellation of instrument for negligent mistake of one party, see note in *Ann. Cas.* 1913A, 432.]

From Multnomah: **GEORGE N. DAVIS, Judge.**

Department 2. Statement by **MR. JUSTICE HARRIS.**

On March 9, 1912, Martha Henrickson agreed to purchase from the defendant, a corporation, five acres

described as tract 3, in block 8, of Hillsboro Garden Tracts for the price of \$1,375, payable in installments. The plaintiff paid \$343.75, took possession of the land, and made permanent improvements. On October 16, 1913, she tendered her contract to the defendant, and offered to surrender all her interest in the land and improvements, but the defendant refused to rescind, and then the plaintiff commenced this suit. The complaint charges the defendant with fraud, and alleges that it falsely represented to her that if she would purchase the land, the plaintiff and all other purchasers would immediately have plentiful and lucrative employment; that improved roads and streets would at once be provided in Hillsboro Garden Tracts; that defendant would provide and operate a vegetable car, running from Hillsboro to Portland, thereby providing cheap and efficient transportation for the purchasers of land in the Hillsboro Garden Tracts; that a cannery or preserving plant would immediately be established and operated in Hillsboro, which would provide a place for the ready disposal of all vegetables that might grow; that improved lands around Hillsboro were selling at the price of \$1,000 per acre; that potatoes never sold in that part of the country for less than \$1.25 per sack; and that the defendant would cause cement walks to be laid in the Garden Tracts, and would improve the streets therein. The defendant denied that it made any misrepresentations, and affirmatively alleged that the plaintiff had been in possession of the premises, had collected the rents and applied them to her own use. A trial resulted in a decree canceling the contract and a judgment against the defendant for \$343.75, the amount paid on the purchase price, and the additional

sum of \$65 to cover the value of the permanent improvements. The defendant appealed. REVERSED.

For appellant there was a brief over the names of *Messrs. Huston & Huston, Mr. W. F. Magill and Mr. George W. Stapleton*, with oral arguments by *Mr. Samuel B. Huston and Mr. Oliver B. Huston*.

For respondent there was a brief over the names of *Messrs. Thacker & Hancock and Mr. George I. Brooks*, with an oral argument by *Mr. G. L. Thacker*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The only evidence relating to the allegation of promised employment is found in the testimony of plaintiff, who said, when referring to the improvement of Division Street, that:

“I was told that they were going to commence it in the fall, and that everybody out there was going to get work on the road.”

The allegation that the defendant represented to Martha Henrickson that improved streets and roads would immediately be provided is not referred to by the testimony of any witness except the plaintiff, who said:

“He showed me also the road [Division Street] where the company was going to build, where it was going to be.”

When speaking of the value of potatoes, the plaintiff also testified that the selling agent told her that potatoes were worth \$1.25 per sack; and there is no other evidence in the record concerning the averment about potatoes, except the evidence of plaintiff to the effect that the crop raised by her was worth only 25 cents per sack. The record is silent upon the remain-

ing allegations appearing in the complaint, unless it be claimed that the printed circulars contained representations which relate to the vegetable car, the preserving plant, the value of improved lands around Hillsboro, and the building of cement walks. The plaintiff testified that advertising literature was handed to her, but there is no evidence to indicate that she either read or relied upon any of the printed statements. It clearly appears from the record that the defendant did intend to open and improve Division Street and the corporation actually let a contract for the work; and it is quite apparent from the testimony of plaintiff herself that the statement concerning employment was merely a conclusion or opinion which was predicated upon the contemplated improvement of Division Street. The plaintiff has failed to offer any evidence concerning a portion of the complaint, and the testimony relevant to the remaining allegations only shows mere opinions or predictions, or indicates a promise to do something which the defendant actually intended to do, and therefore the plaintiff is not entitled to relief: *Marshall v. Hillsboro Garden Tracts*, ante, p. 89 (152 Pac. 493).

2. There is evidence that the defendant made other representations, which are not even mentioned in the complaint, but they cannot be availed of. The plaintiff has not presented a situation, arising out of and confined to the complaint and evidence relevant to the recorded allegations, which will warrant a rescission of the written agreement.

The decree is reversed and the suit is dismissed.

REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and
MR. JUSTICE BEAN CONCUR.

Submitted on briefs October 19, reversed November 9, 1915.

ROBERTS v. LOMBARD.*

(152 Pac. 499.)

Evidence—Parol Evidence Rule.

1. Section 718, L. O. L., declaring that when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be no evidence of the agreement other than the contents of the writing, except where a mistake is in issue, or the validity of the agreement is in dispute, plaintiff, who entered into a contract for the purchase of land, and received a conveyance, cannot, where neither the memorandum of purchase nor the conveyance referred to restrictions upon the grantor's other property, introduce, in the absence of fraud, evidence of a parol agreement by the grantor that his other property in the vicinity should be subjected to the same building restrictions as that acquired by plaintiff.

[As to parol evidence to add to or vary a writing, see note in 56 Am. St. Rep. 659.]

Frauds, Statute of—Authority of Agent—Agreement.

2. Section 804, L. O. L., declares that no estate or interest in land, nor any trust or power concerning such property can be created, transferred or declared except by operation of law, or by a conveyance in writing subscribed by the party or by his lawful agent under written authority, Section 808 provides that agreements for employment of a broker to sell land shall be void unless in writing, and that agreements relating to land shall be void unless in writing signed by the party to be charged or his duly authorized agent whose authority shall be, in writing. A written agreement, authorizing an agent to sell land did not empower him to agree to restrictions on the remaining property of the vendor, but in plain terms reserved to the vendor the right to modify the prices, terms and conditions. *Held*, that as the purchaser was bound at his peril to ascertain the agent's authority, an agreement by the agent that the remaining property of the vendor should be subject to the same restrictions imposed on the property conveyed is void.

[As to necessity that agent have written authority to make memorandum required by statute of frauds, see note in *Ann. Cas.* 1912B, 1295.]

Covenants—Construction.

3. Though a land owner imposed restrictive covenants on most of the parcels sold, that did not show a scheme to generally impose restrictions on all his property, and a grantee who took subject to restrictions cannot enforce similar restrictions against the remaining property of the vendor or against one who purchased without restriction.

*The question of oral or implied building restrictions as to parcels retained by the grantor is discussed in note in 45 L. R. A. (N. S.) 963.
REPORTER.

From Multnomah: JOHN P. KAVANAUGH, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by L. D. Roberts against B. M. Lombard, Caroline S. Lombard and D. G. Wilson.

In substance the plaintiff alleges that the defendant Lombard and his wife caused certain property named in the complaint and owned by them to be platted into blocks, lots and streets "with a view to improving said real property by opening the same as an addition to the City of Portland, Multnomah County, Oregon, and converting it into a high-class, exclusive and highly restricted residence addition in and to the said city," which plat they caused to be approved by the proper authorities and recorded. He also says that:

"The Lombards formed and advertised a general plan for the sale of lots, and represented and advertised that the addition would be a highly restricted, exclusive high-class residence district, and," among other things, "that during the period of 20 years after September 9, 1909, no part of the premises should be occupied or used for any shop, store, saloon, hotel or other place of business, and that no part of said addition should be used, or be permitted to be used, for the carrying on of any trade or business whatever, nor for any other than residence purposes."

He further avers that about December 1, 1909, the defendants Lombard, their servants, representatives and selling agents, for the purpose of inducing the plaintiff to purchase a lot in said addition, represented to him that the restrictions already mentioned would be enforced, and that no lots therein had been or would be sold by the Lombards unless the deed contained the same limitations. He says that he relied

upon these representations and promises, and in consideration thereof, and not otherwise, purchased from them lot 13 in block 11, paying the sum of \$1,100 therefor and receiving from the defendants a deed conveying to him said lot in fee simple, subject to the restrictions and conditions stated. He contended he would not have purchased except for them, that a great number of other persons bought lots in the addition under like circumstances, and that the plaintiff has caused to be erected upon lot 13 a residence which he is now occupying. The grievance of which he complains, as set out in the complaint, is that afterward the Lombards made a deed to defendant Wilson of lot 15 in block 11, omitting the restriction, and although the latter knew that the land had been platted as a high-class, exclusive and highly restricted addition, and that each lot was subject to the restrictions, the defendants threaten to and will erect on lots 14 and 15, in block 11, a shop, store and place of business. In general, the prayer of the complaint is for an injunction preventing the defendants from carrying out their purpose and for further relief. The platting of the property and the recording thereof are admitted by the defendants. The purchase by the plaintiff and his erection of the residence are also admitted, but the restrictions mentioned and the general plan of improvement described in the complaint are denied. The Circuit Court rendered a decree substantially according to the prayer, and the defendants appeal.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

For appellants there was a brief over the name of *Messrs. Kollock, Zollinger & McDowall*.

For respondent there was a brief over the name of *Messrs. Littlefield & Maguire*.

MR. JUSTICE BURNETT delivered the opinion of the court.

A brief review of the testimony on the part of the plaintiff is necessary. Seeking to charge the defendants, the plaintiff introduced an agreement of date September 9, 1909, between Lombard and the Columbia Trust Company, from which we quote the following:

“Lombard for and in consideration of the agreements hereinafter contained does hereby give the company the exclusive right for the period of six (6) months from and after the date of this instrument, for and on behalf of Lombard and as his selling agent or broker, to sell and contract to sell lots and blocks in that certain addition to the City of Portland, Multnomah County, State of Oregon, situated within the corporate limits of the City of Portland, owned by Lombard and known as Olmsted Park. * * The prices at which and terms and conditions upon which said real property shall be sold shall at all times during the life of this agreement be satisfactory to Lombard and shall be such as may from time to time be designated and prescribed by Lombard to the company, it being understood and agreed that Lombard shall have the right at any and all times, upon reasonable notice to the company, to change or modify such prices, terms, and conditions. A memorandum of the prices and terms now satisfactory to Lombard has been written upon each of two copies of said plat of Olmsted Park, each of said copies being signed for identification by Lombard and an officer of the company and one of said copies being in the possession of Lombard and the other in the possession of the company. Said copies are counterparts of each other in the aforesaid and all other particulars and for greater certainty ex-

press reference is hereby made to each of them. All sales made or contracted to be made hereunder by the company shall be made subject in all respects to the terms, conditions, restrictions and requirements set forth and contained in the printed blank form of agreement for the purchase and sale of property in said Olmsted Park of which said form a copy marked 'Exhibit A' is hereto attached; and said 'Exhibit A' is hereby expressly referred to and made a part of this instrument. But Lombard hereby reserves the right at any time during the life of this agreement to change or modify, upon reasonable notice to the company, said blank form of agreement in any respect whatever or to adopt a new form of agreement for use in such sales; and the company agrees in any such event to make all sales subject to the terms, conditions, restrictions and requirements set forth and contained in such new, changed or modified form. And it is expressly agreed that all agreements for the sale of property in said Olmsted Park and all other contracts of any nature relative to such property and all conveyance thereof shall be executed in every instance by Lombard and not by the company."

The commission to be allowed the company is set out, but it is not necessary to consider the same. The contract contained the further provision that:

"The company in consideration of the commission to be paid as aforesaid hereby agrees to make every reasonable effort by advertising and otherwise, to sell lots and blocks in said Olmsted Park, and also agrees to sell the same, whenever sold, at the prices and upon the terms and conditions hereinbefore mentioned and such as may be hereafter from time to time prescribed by Lombard."

The contract concludes with this stipulation:

"It is understood and agreed that the several lots marked 'S' on the plats of Olmsted Park referred to herein are withheld from sale by Lombard and are not to come within the purview of this agreement."

Attached to the agreement as part thereof is the blank form of contract called "Exhibit A," to be signed by intending purchasers, and containing the required conditions already stated in the complaint. A witness for the plaintiff, J. A. Lee, vice-president of the Columbia Trust Company, who executed the agreement, identified a plat which he and the defendant Lombard had initialed for identification, and testified thus:

"Q. Mr. Lee, is this the plat which is referred to in this contract as containing a memorandum of the prices and terms now satisfactory to Lombard?

"A. It is, excepting that I have no recollection of there having been in this contract entered into as between the Columbia Trust Company and Mr. Lombard, any exception of lots for business purposes. I recall that there were exceptions from the contract; that is, that there were certain lots in Olmsted Park that did not come within the purview of the agreement. Lots marked 'S' for identification. But I have no recollection that at any time there were to be any lots, at any time during the period that the Columbia Trust Company had the selling agency, that might be used for other than residence purposes."

Besides the initials which Mr. Lee said were made at the execution of the contract, there appears on this plat this writing:

"Lots 9, 10, 11, 12, block 4, and all of block 12 reserved for business purposes; lots 1, 14, 15, block 11, to be usable for business purposes."

Mr. Lee testifies in substance that to the best of his recollection this memorandum was not on the plat when he initialed it. Mr. Lombard positively declares on oath that it was there at the time. There is no dispute whatever that lots 14 and 15 in block 11 were initialed with the letter "S" as mentioned in the

clause of the contract last quoted. This renders it unnecessary to determine whether the memorandum quoted above was on the plat when Lee and Lombard marked it for identification as part of the contract, for, as lot 13 was indisputably marked "S," it was expressly excluded from the operation of the agency agreement.

Adjoining lot 13, in block 11, upon which the plaintiff has built his residence, is lot 14 in that block, where the defendants are about to build a store, as alleged in the complaint. The plaintiff also introduced in evidence an advertising folder issued by the Columbia Trust Company, describing Olmsted Park in glowing terms. Among other things, it says:

"The proximity of Irvington, which is universally recognized as Portland's finest home district, assures its success as a high-class residence district."

Further:

"Not only is Olmsted Park in the direction in which people are accustomed to look for high-class property, but it is surrounded by property covered with even heavier building restrictions than has made Irvington the cream of Portland's residence property."

Again:

"Here is the only opportunity for an exclusive street-car service in Portland. With the Broadway line passing up Broadway, through a high-class residence district all the way, then north through Irvington, and ending in the highly restricted district in and surrounding Olmsted Park, we have an exclusive car service which cannot be equalled in the entire city. * * Now Olmsted Park is but a few moments' further ride and the most shut-in lot in Olmsted Park has a better outlook than the most slightly lot in Irvington. The restrictions and improvements are even heavier and better."

These are the only printed representations appearing in the evidence about restrictions. Indefinite as they are, they do not correspond with nor prove the allegations of the complaint to the effect that the Lombards had advertised a prohibition for 20 years of any shop, store, saloon, hotel or other place of business on the platted realty.

The plaintiff testifies in substance that he saw the advertisements of the Columbia Trust Company in the daily papers, and wrote to the company about them, in response to which Mr. E. A. Clark came to him and left the circular mentioned. He says:

“Mr. Clark referred me to the fact that this was to be a very highly restricted residence district; that the residences were to cost twenty-five hundred dollars or more; were to be located 25 feet back from the street line or lot line, rather; that there could be no stores or other places of business, or apartment houses, or any buildings of that kind in the district.”

Clark was a salesman for the Columbia Trust Company, and corroborates the testimony of Roberts about the representations made. It appears that after these negotiations with Clark he and plaintiff signed the following paper:

“This agreement, entered into this 1st day of January, 1910, by and between Columbia Trust Company, a corporation of Portland, Oregon, acting as agent, and L. D. Roberts, purchaser; address 639 Union Ave. No. —, witnesseth: That the Columbia Trust Company, agent, agrees to sell and the aforesaid purchaser agrees to buy lot numbered 13 in block numbered 11 in Olmsted Park subject to confirmation by owners, for the purchase price of \$1100.00 upon the following terms: \$110.00 cash, and \$16.50 per month at 6% on deferred payments, and subject also to such restrictions and conditions as may run with the land.

"Columbia Trust Company hereby acknowledges receipt of \$110.00 as earnest money and part of the purchase price, which deposit shall be returned in case owner does not confirm this sale.

"COLUMBIA TRUST COMPANY, Agent,

"By E. A. CLARK.

"L. D. ROBERTS, Purchaser."

The next succeeding step in the transaction was the execution by Roberts and the Lombards of an agreement in writing for the plaintiff to buy and the Lombards to sell to him lot 13 in block 11, subject to the conditions pleaded in the plaintiff's complaint. This was followed by a deed, of date May 8, 1912, from the Lombards to the plaintiff conveying the same property with the same 20-year restriction. The plaintiff does not claim that he ever talked with Lombard, or anyone else, except Clark, about the transaction. Neither does it appear that the defendants ever were aware of the statements of Clark or that he had any connection with the negotiations culminating in the conveyance of the property. Plaintiff introduced the testimony of several other persons who had bought lots in the addition with the same restrictions.

1. At the outset we note that this is not a suit to rescind the contract. In effect the object of this litigation is to fetter the estate of Lombard in property not included in plaintiff's deed or in the contract which the former made with the Columbia Trust Company. The sole basis for this is the oral representation made by the witness Clark, and upon that alone, without alleging any fraud, the plaintiff seeks to ingraft a condition upon an estate in real property. It is stated thus in Section 713, L. O. L.:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered

as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:—1. Where a mistake or imperfection of the writing is put in issue by the pleadings; 2. Where the validity of the agreement is the fact in dispute. * * ”

On the merits of the case as affected by this provision of our statute we find the plaintiff signing the memorandum sales slip with Clark, subjecting the lot he bought to restrictions and conditions, but saying nothing whatever about a like imposition upon any other property of the defendants. He follows this up with a contract to buy his lot under like restrictions, but again omitting all reference to other property. The ultimate deed conveying the title is subject to the same criticism. In the absence of any allegation of fraud on the part of the defendants or anyone professing to act for them, and considering that this is an effort to enforce a contract rather than to rescind it on the ground of fraud, it would seem that Section 713, L. O. L., already quoted, would control the case against the contention of the plaintiff.

2, 3. Moreover, the plaintiff would prevail, if at all, upon the oral statements of Clark, a salesman employed by the Columbia Trust Company. The authority of the agent in this instance is in writing, and it is a question of law for the court to construe that instrument and to declare its legal effect. In plain terms Lombard reserved the right to change or modify the prices, terms and conditions. He also withholds from the operation of the contract of agency the other lots upon which the plaintiff would impose the conditions mentioned. Applicable to the matter of agency, Section 808, L. O. L., reads thus:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law; * * 7. An agreement concerning real property, made by an agent of the party sought to be charged, unless the authority of the agent be in writing; 8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The case is also vitally affected adversely to the plaintiff by Section 804, L. O. L., reading thus:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority and executed with such formalities as are required by law."

In *Baker v. Seaward*, 63 Or. 350 (127 Pac. 961), Mr. Chief Justice EAKIN wrote:

"It may be stated generally that a principal is not bound by the acts of his agent, unless within the real or apparent scope of the authority of such agent; and one dealing with an agent is bound, at his peril, to ascertain the extent of the agent's authority, and is chargeable with knowledge thereof: *Reid v. Alaska Packing Co.*, 47 Or. 215 (83 Pac. 139). And where a party relies upon a contract made with a person claiming to be an agent of another, he must prove, where the agency is disputed, that he was expressly empowered to make the contract, and that its terms were within the scope of his authority: *Rumble v. Cum-*

mings, 52 Or. 203 (95 Pac. 1111). The agency being proved or admitted, it is the duty of the court to determine whether or not the particular act of the agent relied on was within his authority. * * Where the fact of the appointment and authority of an agent are not in controversy, it is the duty of the court to declare, as a matter of law, whether or not it empowers him to perform the particular act in question."

The rule is thus stated in 1 Mechem on Agency, Section 707:

"Parties dealing with an agent known by them to be acting only under an express grant, whether the authority conferred be general or special, are bound to take notice of the nature and extent of the authority conferred. They must be regarded as dealing with that grant before them, and are bound at their peril to notice the limitations thereto prescribed either by its own terms or by construction of law. * * So, where the act assumed to be done by the agent is one for which the authority is required by law to be conferred by a written instrument or by a writing under seal, the parties dealing with him must take notice of that fact, and they will be bound by any limitations or restrictions contained therein, although they have not had actual knowledge of them."

To the same effect is 1 Clark & Skyles on Agency, Section 210, subdivision "d":

"In the case of agencies of a certain nature it is required that the authority must be conferred according to certain formalities, as that it must have been in writing, and under seal, or must have been placed on record. Where such is the case, it is the duty of a third person dealing with such agent to see that all conditions requisite to the conferring of such authority have been complied with, and that the agent has acted within such authority. If he does not do so, he deals with the agent at his own risk."

The principle to be derived from these excerpts is that apparent authority cannot affect a case of agency which is prescribed by writing of which the third party has knowledge, either actual or imputed to him by operation of law. Bound by the statute as he was, the plaintiff must be held to have known that the statements of Clark purporting to bind the estate of Lombard in the remainder of the property were in excess of his authority, unless the same was in writing, and would not be obligatory upon the defendants. It has often been held that the mere declarations of one professing to act as an agent are not sufficient proof of his agency. To charge the defendants here with the representations of Clark respecting any of the real property mentioned, it is essential that plaintiff should show some writing signed by Lombard authorizing them to be made. The record is absolutely silent about any such precept to Clark. Moreover, an inspection of the instrument relied upon by the plaintiff to create authority in the Columbia Trust Company discloses that lot 14 in block 11, adjoining the plaintiff's premises, was excluded from the operation of the agency contract, it being marked with the letter "S" as described in the stipulation of agency. A common illustration of the clause rendering void an agreement concerning real property, made by an agent of the party sought to be charged, unless his agent's authority be in writing, is found in the everyday transaction of a power of attorney under seal being required to pass title by deed executed by an agent.

The plaintiff relies strongly on *Morse v. Whitcomb*, 54 Or. 412 (102 Pac. 788, 103 Pac. 775, 135 Am. St. Rep. 832). In that case the owners of property platted it into lots, blocks and streets, and when selling to the plaintiff personally represented that a strip on one

side was reserved for half a street between their addition and another adjacent. It was left open for more than 10 years, and used generally as a street by people traveling in that vicinity. The question of agency was not involved. The acts and declarations of the holders of the title amounted to a dedication *in pais*. The case is easily distinguishable from the present contention, in that the owner himself made the statements and did the acts characterizing the transaction and charging the estate. In the instant case no representation whatever, either oral or written, can be attributed to the defendants. The conditions upon which Lombard offered his property for sale were carefully detailed in the authority which he gave his agent. It could not be properly promulgated in any other manner than by the writing if we respect the terms of Sections 804 and 808, L. O. L. In *Allen v. City of Detroit*, 167 Mich. 464 (133 N. W. 317, 36 L. R. A. (N. S.) 890), the action of the court was based upon the positive statements of the owner himself and his previous advertisement restricting the use of the property. *Duester v. Alvin*, 74 Or. 544 (145 Pac. 660), was a case where the defendant had accepted a deed with similar restrictions, and other parties in the addition successfully compelled him to observe its terms. That precedent would be authority for the proposition that those owning property under such conditions adjacent to the plaintiff's holding might compel him to observe the restriction under which he took title. It is worthy of note that Mr. Chief Justice MOORE, writing in *Duester v. Alvin*, quotes with approval the following clause from *Leaver v. Gorman*, 73 N. J. Eq. 129 (67 Atl. 111):

"A court of equity will restrain the violation of a covenant entered into by a grantee, restrictive of the use of lands conveyed, not only against the grantee

covenantor, but against all subsequent purchasers having notice of the covenant, whether it run with the land or not. There is, however, this distinction: The original grantor, in imposing the covenant upon the grantee, either may or may not bind himself. If he does not bind himself then his grantee, having no right of action against him, cannot pursue any other grantee to whom he may subsequently convey the whole or a part of the remaining lands."

Evans v. Foss, 194 Mass. 513 (80 N. E. 587, 11 Ann. Cas. 171, 9 L. R. A. (N. S.) 1039), was a case where the deeds of both parties had the same restrictions and were enforceable one against the other. The doctrine of *Allen v. Barrett*, 213 Mass. 36 (99 N. E. 575, Ann. Cas. 1913E, 820), is that if there is a general scheme for restriction, each grantee holding under a deed containing such a reservation may be enjoined at the suit of another grantee claiming through a like conveyance. This is practically the situation in *Duester v. Alvin*, 74 Or. 544 (145 Pac. 660). The English cases, *Re Birmingham and District Land Co. and All-day*, 15 Eng. Rul. Cas. 285, *Davis v. Leicester*, 63 L. J. Ch. Div. (N. S.) 440, and *MacKenzie v. Childers*, 59 L. J. Ch. Div. (N. S.) 188, are all instances where the restrictions were expressly set out in the advertisement of an auction sale to include the whole tract, all by the authority of the owners, and this was held to show a general scheme by which the owner was also bound. A careful examination of all these authorities cited by the plaintiff show that they depend upon the personal declarations of the defendant, and not upon the authority of an alleged agent.

Other cases like *Wilson v. McCarthy*, 66 Or. 498 (134 Pac. 1189), and *Owen v. Jones*, 68 Or. 311 (136 Pac. 332), are suits to rescind a contract on account of the fraudulent conduct of the agent of the defend-

ant upon which the latter relies. As before stated, in the present juncture, the plaintiff does not seek to rescind, but would bind the defendant by the unauthorized act of one assuming to be an agent, when the law casts upon the plaintiff the knowledge that his authority must be in writing. *Copeland v. Tweedle*, 61 Or. 303 (122 Pac. 302), was decided on the ground that no limitations having been placed on the authority of a broker employed to find a purchaser for land, his representations as to the amount of timber on the premises bound the defendant in a suit to rescind. Here, the alleged agent was not representing the quality of the land, but was trying to impose a burden upon it and to fetter the estate of the defendants therein. This was something beyond his actual authority, which the law requires to be in writing. Lombard had a right to impose a condition upon one grantee and not upon another, and to reserve, as he did, some of his property from the operation of the contract of agency. In the cases of *Mulligan v. Jordan*, 50 N. J. Eq. 363 (24 Atl. 543), and *Haines v. Einwachter* (N. J. Ch.), 55 Atl. 38, it was held that a general plan of improvement is not established by the fact that the same condition is inserted in each deed for distinct tracts. There is no privity of estate between the several grantees of the defendants who by separate deeds took under like restrictions, and if nothing more is shown, it is not sufficient to establish a general building scheme limited as the plaintiff contends. The property of Lombard was his to deal with as he chose, so long as he imposed no unlawful restriction upon those who took title from him. Each individual accepted his conveyance with the condition annexed without reference to any other grantee; and while, as in *Duester v. Alvin*, 74 Or. 544 (145 Pac.

660), one grantee holding under such a grant might enforce the same clause in the deed of an adjacent grantee, there is no obligation resting upon the defendant Lombard as to his other holdings not included in the terms of his contract. We find much in the plaintiff's brief about Lombard accepting the benefit of the contract and being also subject to its burdens. This, however, is not *apropos*, for, as we have shown by our statute, there is no competent evidence of the contract the plaintiff avers. More than this, ratification depends upon knowledge of all for which approval is sought, and there is no evidence that Lombard was aware of Clark's statement to the plaintiff.

We determine that the plaintiff is not successful in his undertaking to ingraft upon his contract and deed an additional clause controlling Lombard, concerning his other property, on the ground that the conveyances from him to the plaintiff must be considered as including all the conditions affecting the grantor. Again, because the endeavor of the alleged agent to impose such a condition on other premises involved an agreement concerning real property, it was void because his authority was not in writing. The conclusion is that the decree of the Circuit Court must be reversed and the suit dismissed. **REVERSED. SUIT DISMISSED.**

Argued October 13, affirmed November 9, 1915.

ADAMS v. CORVALLIS & E. R. CO.*

(152 Pac. 504.)

Master and Servant—Actions for Injuries—Questions for Jury.

1. In an employee's action for injuries sustained while reducing a carload of lumber and claimed to have been caused by the method in which the foreman directed that the work should be done, evidence held to make the question for the jury as to whether the method of performing the work adopted by the employer was different from the usual one pursued by it.

[As to duty of master to servant, see note in 75 Am. St. Rep. 501.]

Master and Servant—Liability for Injuries—Contributory Negligence.

2. Where employees were not permitted to perform their work in their own way, nor according to the usual method adopted by the employer, but were directed by the foreman, who represented the employer and whose orders it was their duty to obey, to follow a different method, the employer was in no position to assert that the injury sustained by one of such employees by reason of the method of doing the work was occasioned by his fault.

Master and Servant—Actions for Injuries—Questions for Jury.

3. Where an employer's foreman told employees who were reducing a carload of lumber that the method followed by them was too slow, and that one of them should get inside the car and shove out pieces of lumber until a sufficient amount had been removed, when the other was to signal him to stop, and then pick up and pile the lumber, and there was evidence that the employees had difficulty in hearing and understanding each other's signals, it was a question for the jury whether the method adopted by the employer was a reasonably safe one, and whether the work was carried on so as to expose the employee picking up the lumber to risks and dangers which might have been guarded against and avoided by the exercise of due care.

Master and Servant—Liability for Injuries—Methods of Work.

4. In the absence of specific statutory requirements, a railroad company discharges its full duty to its employees in adopting and using standard railroad methods, rules or systems.

Master and Servant—Liability for Injuries—Care Required.

5. An employer is not an insurer, but is liable for consequences not of danger, but of negligence, and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of

*The question of whether a servant relying upon orders is guilty of contributory negligence is discussed in note in 17 L. R. A. 604.

Direct command to employee as making assumption of risk and contributory negligence questions of fact only is the subject of a note in 30 L. R. A. (N. S.) 442.

On master's liability for injuries received in obeying direct command, see note in 48 L. R. A. 753.

the business; the standard of due care being the conduct of the ordinarily prudent man.

Negligence—Questions for Jury.

6. While mere proof of an accident ordinarily raises no presumption of negligence, yet, where it is accompanied by proof of facts and circumstances from which an inference of negligence may or may not be drawn, the case must be submitted to the jury.

[As to *res ipsa loquitur* doctrine as applicable to relation of master and servant, see note in *Ann. Cas.* 1914D, 386.]

Master and Servant—Actions for Injuries—Burden of Proof.

7. An employee suing for injuries claimed to have been due to an unusual method of work which he was directed by the foreman to follow was bound to show, not only that the method adopted and pursued was unusual, but that it was more dangerous in itself than the ordinary one.

Appeal and Error—Review—Questions of Fact.

8. Under Article VII, Section 3, of the Constitution providing that no fact tried by a jury shall be otherwise re-examined in any court unless the court can affirmatively say there is no evidence to support the verdict, where the jury has decided a question of fact on conflicting testimony, the Supreme Court is neither required nor permitted to exercise its judgment in order to determine which assertion of the parties is true.

Evidence—Expert Testimony—Questions for Jury.

9. In an employee's action for injuries sustained while assisting in removing lumber from a car, and claimed to have been due to the dangerous method of doing the work adopted by the employer, the question as to the manner of removing the lumber from the car was one of common experience and knowledge which the court was warranted in submitting to the jury, and was not one upon which the testimony of experts was required to aid the jury in passing upon the question at issue.

Master and Servant—Actions for Injuries—Questions for Jury.

10. According to the testimony for plaintiff in an employee's action for injuries sustained while reducing a carload of lumber, F. was handing lumber to plaintiff, when the foreman stated that that was too slow a method of removing the lumber; that F. should get inside the car and shove out pieces of lumber; that plaintiff should stand aside and keep tally as the pieces fell, and, when a sufficient amount had been removed, signal F. to stop, and, upon receiving his answer, pick the lumber up and pile it. Plaintiff and F. protested against this method, but complied with the order. After a number of sticks had been thrown out plaintiff called F. to stop, but F., being uncertain whether he heard a call, answered back twice, and, receiving no reply, threw out another piece, striking plaintiff, who had started to pile up the lumber. Plaintiff testified that he heard F. answer, but could not say what he said. *Held*, that plaintiff was not negligent as a matter of law, as the evidence showed that it was not easy for the men to hear each other's signals, and it was necessary for plaintiff

to accept F.'s response to his signal or cause the very delay which the foreman's order was designed to obviate.

[As to reasonableness of rule promulgated by master for guidance of servant as question of law or fact, see note in *Ann. Cas.* 1913C, 187.]

Master and Servant—Actions for Injuries—Burden of Proof.

11. A servant who disobeys the orders of his superior takes upon himself the burden of showing the lawful reason for such disobedience.

Master and Servant—Liability for Injuries—Contributory Negligence—Disobedience of Orders.

12. A servant is not guilty of contributory negligence in obeying the orders of his master, unless the risk is so great that a person of reasonable prudence under the same circumstances would have refused to obey.

Master and Servant—Actions for Injuries—Instructions.

13. In an employee's action for injuries sustained while assisting in reducing a carload of lumber and claimed to have been caused by the unusual and dangerous method of doing the work adopted by the employer's foreman, the instructions *held* to have fairly submitted the question to the jury.

Master and Servant—Liability for Injuries—Assumption of Risk.

14. Independent of the statute, a servant assumes the ordinary risks and dangers incident to his employment.

Master and Servant—Actions for Injuries—Presumptions—Assumption of Risk.

15. Where the jury finds an employer negligent, assumption of risk is not presumed.

Master and Servant—Liability for Injuries—Assumption of Risk.

16. An employee did not assume risks occasioned by the negligence of his employer.

Master and Servant—Liability for Injuries—Assumption of Risk.

17. An employee did not assume the risk of injury in obeying the orders of his foreman, unless a person of ordinary prudence would not have done so.

Master and Servant—Liability for Injuries—Contributory Negligence Distinguished from Assumption of Risk.

18. In an employee's action for injuries sustained while assisting in reducing a carload of lumber, it was plaintiff's claim that against the protests of him and F. the foreman directed F. to get in the car, where he could not see plaintiff, and shove out pieces of lumber until signaled by plaintiff to stop, when plaintiff was to pile up the lumber; that he and F. had difficulty in understanding each other's signals, and that he signaled F. to stop, but was injured by another piece thrown out by F. It was defendant's claim that plaintiff carelessly and negligently, without giving F. the signal to stop, and in violation of instructions, commenced picking up the lumber while F. was throwing it out. *Held*, that this dispute was properly tried out as a question of contributory negligence, and not as one of assumption of risk.

From Linn: PERCY R. KELLY, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by George O. Adams against the Corvallis & Eastern Railroad Company, for damages for personal injuries claimed to have been received by plaintiff while in the employ of the defendant company. The cause was tried before a jury, resulting in a verdict and judgment in favor of plaintiff in the sum of \$4,000, from which judgment defendant appeals.

On April 25, 1913, plaintiff and one Clyde Freeman were employed by the Corvallis & Eastern Railroad Company in its car-shops at Albany, Linn County, Oregon. On that date they were directed by George Hoflich, the outside foreman, to reduce a carload of lumber then standing in the car-shops by removing a sufficient quantity of lumber to bring the load within the proper carrying capacity. They undertook to remove the lumber from the car in the following manner:

“Freeman standing at the edge of the door of the car would slide out a stick of lumber, and as the same approached the ground it would be received by Adams and by him placed in a pile on the ground.”

The car was an ordinary furniture car, and was loaded with lumber to within about 10 inches of the top and some 10 or 12 feet from the ground. Plaintiff claims, and the evidence tended to show, that after a number of pieces of lumber had been removed George Hoflich, the outside foreman of the defendant company, ordered the work to proceed in a different manner, to wit, Freeman was to get inside the car and shove out pieces of lumber. Adams was to stand by,

apart from the lumber, and keep tally as they fell. When a sufficient amount had been removed, he was to give a signal to Freeman to stop, and upon receiving his answer Adams was to pick up the lumber and pile it. This change was made in order to increase the speed. Plaintiff and Freeman protested against the proposed method, but the foreman insisted, whereupon they complied with his order. After a number of sticks had been thrown out plaintiff called Freeman, who, uncertain whether he had heard the call, answered back twice, and, receiving no reply, threw out another piece. On hearing Freeman call, in response to him and pursuant to the given orders, Adams went forward to remove the lumber, and was struck by the piece thrown out by Freeman. Plaintiff claims that the defendant was negligent in the following particulars:

(1) In keeping in its employ as outside foreman, George Hoffich, because he was incompetent and inexperienced; (2) that the method of work directed by him was dangerous and unsafe; and (3) "that defendant, through its agent and servant, the said George Hoffich, ordered plaintiff and the said Clyde Freeman to perform their work by an unsafe method, against their objections, and notwithstanding a safe method, as hereinbefore described, was practicable, as defendant well knew."

The main charge of negligence is as follows:

"That while the plaintiff and the said Clyde Freeman were engaged in reducing the said car of lumber in a safe manner, to wit, by the said Clyde Freeman, within the car, passing out to the plaintiff one piece of lumber at a time, the defendant then and there, through its agent and servant, the said outside foreman, George Hoffich, negligently ordered the plaintiff and the said Clyde Freeman to proceed with the work in another manner, to wit, by the said Clyde Freeman throwing out a number of pieces in succession until

the plaintiff should give a signal, whereupon the said Freeman was to pause until the plaintiff should have removed the accumulated pile of lumber; that the said Clyde Freeman was so situated in the car that it was impossible for him to see the plaintiff, or for plaintiff to see the said Clyde Freeman, and it was difficult, and at times impossible, for the said Clyde Freeman and the plaintiff to receive or understand the signals given by each other; that the method of work so ordered by the outside foreman was for these reasons unsafe; that plaintiff and the said Clyde Freeman protested against the performance in the manner so ordered, but that defendant, through the said outside foreman, negligently insisted on the performance in said unsafe manner, whereupon the said Clyde Freeman and plaintiff proceeded to perform the work in the manner so ordered.

“That while plaintiff and the said Clyde Freeman were engaged, pursuant to the order of the said George Hoffich, in doing the work in the manner so ordered, and while plaintiff was removing a pile of lumber which had been thrown out by the said Clyde Freeman, the said Clyde Freeman, owing to the misunderstanding of a signal given by plaintiff, and owing to failure to receive a signal given by plaintiff, threw out a piece of lumber, which struck plaintiff upon the head, rendering him unconscious and severely wounding him.”

In its answer defendant denied any negligence on its part, and as a first affirmative defense averred, in substance:

“That on said April 25, 1913, plaintiff, together with two other workmen employed by this defendant, was engaged in reducing a carload of lumber, and that said work was performed in the following manner: One of said employees, named Freeman, was inside the car shoving out sticks of lumber from said car, and the plaintiff was upon the ground, and when a sufficient number of sticks of lumber had been so shoved from the car by said Freeman, it became and was the duty of the plaintiff to straighten said lumber and arrange

the same in a pile; that while said Freeman was shoving lumber out from said car it was impossible for him to see the plaintiff and to know the plaintiff's whereabouts, and that it became and was the duty of the plaintiff to keep himself free and clear of any sticks of lumber which the said Freeman should shove out of said car, all of which plaintiff fully knew, appreciated and understood; that while engaged in said work said Freeman pushed one of said sticks of lumber out of said car, and the same fell crosswise, and the said plaintiff thereupon recklessly and carelessly, and without giving any signal whatever to Freeman, and without taking any care whatever for his own safety to protect himself from being struck by any other piece of lumber which said Freeman might shove from said car, stepped directly in front of the opening through which said Freeman was shoving lumber, and the said Freeman, not knowing that plaintiff had thus placed himself in a position of danger, shoved another stick of lumber from said car, and the same struck plaintiff, causing whatever injury plaintiff suffered at said time; and that said accident was caused by the carelessness and negligence of the plaintiff as above set forth, and was not caused or contributed to in any way by any negligence on the part of this defendant or any of its employees."

As a second affirmative defense defendant detailed the manner of reducing the carload of lumber, and alleged that in performing the work Freeman and plaintiff were fellow-servants, and that the act by which plaintiff was injured was that of a fellow-servant. As a third affirmative defense, after a recital of the transaction practically the same as in the first defense, defendant alleged assumption of risk. The reply put in issue the affirmative matter of the answer. Upon the trial, before the introduction of any evidence, counsel for defendant requested plaintiff to elect whether he would proceed under the common law or

under the Employers' Liability Act. His counsel consented to proceed under the rules of the former.

As a witness in his own behalf, after stating that at the time of the accident he was at work under the direction of George Hoffich, outside foreman, the plaintiff testified in part thus:

"We were working shorthanded. Previous to that we always had at least three men. One man stood inside of the car and pushed—handed the lumber out. Mr. Freeman pushed the lumber out to me. I took it away as he was handing it to me, piled it on a pile, and put the dimensions on a car. * *

"Q. How long did you continue to do the work in that manner? * *

"A. Just a short time; yes, sir. * * Mr. Hoffich * * came around and told us we were working too slow; * * that Freeman should get inside and shove the lumber out, get back in behind the lumber in the back of the car, where he could get to the end of it, and shove it out, and shove the lumber out, and when he got a portion of the lumber out, or when I was to signal, and he was to stop while I carried it away, and while it was falling out of the car I should take the dimensions of the lumber, and when I told him to stop he was to stop while I carried it away from the car and piled it. * * I told him that I didn't feel as though I would like to stand underneath the car while a man was inside shoving it, that he couldn't see me or I couldn't see him, and Freeman objected because he didn't like to be up in the car shoving it out, not being able to see me. * * He [Hoffich] said that we had to do it his method; he had to get the car out in a hurry."

After stating that they followed the foreman's directions, plaintiff continues:

"He [Freeman] was lying on his stomach in the car. There was just about of, I should judge, possibly hardly a foot space between the top of the lumber and the roof of the car. * * I stood back, oh, possibly

about 6 foot from the door, back toward the end of the car, and Freeman, who was inside of the car at the end of the lumber, he must possibly have been in there at least 8 or 10 foot at the least, from that to 12 or 16 feet from the door of the car, behind the lumber, shoving it out. * * He shoved out a considerable number of pieces of lumber, and I checked them as they fell. * * When I thought that we had nearly enough lumber out to make the required number that we had to reduce, I called to him to wait a minute, and he answered * * something twice; I couldn't say what; * * and when he answered I immediately proceeded for to pick up the lumber and pile it to one side, * * and I went to pick up a piece of lumber, another one came; well, when I went to pick up a piece lumber, that is as far as I can go. I don't remember being struck at all."

In regard to the usual method adopted by defendant in reducing carloads of lumber plaintiff testified:

"Q. And during that time you would throw out the material, and one would check it off, the number of pieces, and keep account of it?

"A. One would check it off, one would pass it out, and the other would take it away; that was the usual method. I was usually checking. * * No; very seldom piled it [the lumber]. I usually did the checking. We always worked before with three men. We were short-handed that time. They had laid men off, and Mr. Taylor said we had to do it again."

George Hoffich, witness for defendant, testified in part that cars of lumber were often overloaded; that that morning he, Mr. Adams and Mr. Freeman went down to reduce the load of lumber, and they removed a few 2x8 and 2x12 timber from the top, and then came to some 2x4's, and, as they were light, he said to Freeman, "Just shove them out and let them fall on the ground, and after you get a certain amount out, why, we will stop and pile them up"; that he said to Mr.

Adams, "Stay back and let Mr. Freeman shove them out; let them hit the ground." He testified that he then went to another car and proceeded to remove some 2x3 lumber; that after he had thrown out 10 or 12 pieces, when about 50 feet away from Adams, just as he struck the ground, he heard someone say:

" 'Oh!' I looked around and seen Mr. Adams hold his hand up to his head. I immediately went to him, and says to him, I says, 'What is the matter with you, Adams?' 'Why,' he says, 'I thought,' he says, 'there was one stick fell on crosswise,' he says, 'I thought I would straighten it out; but,' he says, 'I got hit on the head,' he says. 'I will be all right in a little bit.' I says to Mr. Freeman, I says—I called him Clyde—I says, 'Clyde, stop,' I says, 'come out; Adams is hurt'; and he immediately came out of the car."

Hoflich said that he spoke to Freeman in an ordinary voice; that Freeman threw out one stick after Adams cried out. Evidence on the part of defendant tended to show that the usual method of performing the work, if the material was heavy, was to take several men to remove it, and, if light, for one man to throw it out, and that Adams usually kept check on the lumber.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Weatherford & Weatherford*, with an oral argument by *Mr. M. V. Weatherford*.

For respondent there was a brief and an oral argument by *Mr. Elmer Richardson*.

MR. JUSTICE BEAN delivered the opinion of the court.

1-3. The principal questions for consideration were raised by the timely interposition by defendant's counsel of a motion for a nonsuit and one for a directed

verdict in its favor. It is charged on the part of the company that the evidence in the case is insufficient to be submitted to the jury or to support the verdict. A point of contention is that there is no proof in the record that the method of performing the work adopted by defendant was not the usual one pursued by it. From the testimony of the plaintiff above referred to we are unable to accede to this. It is clearly shown by his evidence that the usual manner of performing the kind of work in which he was engaged at the time of the injury was different from that directed by the order of the foreman, while the testimony of Hoflich and other witnesses for defendant tend to contradict the plaintiff. The defendant is not in a position to assert that it was plaintiff's fault that occasioned the injury, for the reason that the evidence tended to show, and the jury found, that Adams and his co-worker, Freeman, were not permitted to perform the task in their own way nor according to the usual method adopted by the company. In the execution of the undertaking the defendant was represented by Mr. Hoflich. It was the duty of these workmen to obey his orders. When the foreman informed Adams and Freeman that the mode of reducing the carload of lumber then pursued by them was too slow, and directed them to perform the work in a particular way, which differed from the customary manner, all of which was detailed to the jury, it then became a question for that tribunal to determine from all the facts and circumstances shown by the evidence whether the process adopted by the defendant was a reasonably safe one, or whether the work in which the company was engaged was carried on so as to expose its servant Adams to risks and dangers which might have been

guarded against and avoided by the exercise of due care: *Galvin v. Brown & McCabe*, 53 Or. 598 (101 Pac. 671); *Brown v. Oregon Lumber Co.*, 24 Or. 317 (33 Pac. 557). The jury by their verdict found the latter condition prevailed, and that it was the proximate cause of the injury.

4, 5. In the absence of specific statutory requirements, a railroad company discharges its full duty to its employees in adopting and using the standard railroad methods, rules or system: *Jackson v. Wheeling R. R. Co.*, 65 W. Va. 415 (64 S. E. 450). In the performance of work similar to that in which the plaintiff was employed at the time of the accident, in the conduct thereof the duty of the master is the same as devolves upon him to select competent servants or to supply them with suitable devices or appliances to do the work allotted to them. The standard of due care is the conduct of the ordinarily prudent man: *Brown v. Oregon Lumber Co.*, 24 Or. 317 (33 Pac. 557); *Titus v. Bradford*, 136 Pa. 618 (20 Atl. 518, 20 Am. St. Rep. 944); *Johnson v. Portland Stone Co.*, 40 Or. 440 (67 Pac. 1013, 68 Pac. 425). Employers are not insurers. They are liable for consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business: *Coin v. J. H. T. Lounge Co.*, 222 Mo. 488 (121 S. W. 1, 17 Ann. Cas. 888, 25 L. R. A. (N. S.) 1190).

6, 7. While mere proof of an accident ordinarily raises no presumption of negligence, yet, where it is accompanied by proof of facts and circumstances from which an inference of negligence may or may not be drawn, the case must be submitted to the jury: *Geldard v. Marshall*, 43 Or. 438, 444 (73 Pac. 330); *Galvin v. Brown & McCabe*, 53 Or. 598 (101 Pac. 671). It was incumbent upon the plaintiff to show, not only that

the method adopted and pursued by defendant in reducing the car of lumber was unusual, but also that it was more dangerous in itself than the ordinary one: *Cunningham v. Fort Pitt Bridge Wks.*, 197 Pa. 625 (47 Atl. 846).

8. The pivotal question in the case at bar is a disputed one of fact, which, from conflicting testimony, the jury have decided in favor of plaintiff. We are not required nor permitted to exercise our judgment in order to say which assertion of the parties is true. This was the special province of the jury. Article VII, Section 3, of the Constitution provides in part that:

“No fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.”

It was for the jury to determine from the evidence under the law whether the method put in operation by defendant was a reasonably safe one. The jury evidently believed that the plan adopted necessitated that Freeman be ensconced behind the load of lumber on the inside of the car, making a kind of breastwork over which he was compelled to throw the lumber, and that Adams' position on the outside, where he was required to speedily remove the timber, with no flag of truce, and only a signal by verbal communication, which was likely to be misunderstood, was unnecessarily rendered a dangerous place in which to work.

9. The question relating to the manner of removing lumber from a car was one of common experience and knowledge, and the court was warranted in submitting it to the jury. It was not a matter upon which the testimony of experts was required to aid the jury in passing upon the question at issue. Our employers'

liability law (Laws 1911, p. 16) enjoins upon an employer in work involving a risk or danger to employees the duty of using every device, care and precaution which it is practicable to use for the protection and safety of life and limb. While we are of the impression that the present case is governed by, and should have been tried under, that law, it was not invoked by plaintiff upon the trial. This, however, was favorable to the defendant.

10-12. As to the defense of contributory negligence, it could not be said, as a matter of law, that the plaintiff was negligent. The method of work was changed to promote the speed. Plaintiff was directed to check the dimensions of pieces of lumber as they fell, and, after signaling Freeman to stop and receiving his response, to proceed with the removal of the sticks already thrown out. He followed this direction. Had he delayed until Freeman had crawled forward to the door of the car, he would have violated his orders and defeated the purpose of expediting the preparation of the car. Plaintiff was not legally in fault for following the directions of the foreman. His direct evidence and the difficulty experienced by Freeman in determining what plaintiff said at the time of the accident tended to show that it was not easy for the men to hear the signals in the positions in which they were placed by the command of Hoffich. It was necessary for plaintiff to accept the signal given by Freeman or cause the very delay which the foreman's plan of operation was designed to obviate. Under these circumstances, the jury might reasonably find that the plaintiff was not at fault nor guilty of contributory negligence. It is true that the evidence of Hoffich and the other witnesses for defendant tended to show that Freeman could hear a person distinctly on the inside

of the car, but this controversy was within the province of the jury. A servant who disobeys the orders of his superior takes upon himself the burden of showing the lawful reason for such disobedience. Respect for those in the master's authority, as well as a consideration for his own interests, may very properly induce one to waive his own judgment for that of his superior. No doubt, this was the reason why Adams adhered to the orders of Hoflich and refrained from entering into a dispute and creating discord, and perhaps subjecting himself to a dismissal. The company is not in a position to claim that Adams erred in carrying out the plan mapped out by this foreman: *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, 210. A servant is not guilty of contributory negligence in obeying the orders of his master, unless the risk is so great that a person of reasonable prudence under the same circumstances would have refused to obey: *Pressed Steel Car Co. v. Herath*, 207 Ill. 576, 580 (69 N. E. 959); *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205, 210; *Butler Ballast Co. v. Hoshaw*, 94 Ill. App. 68.

13. The court instructed the jury in part:

"If you find from a preponderance of the evidence that the plaintiff and his coemployee, Clyde Freeman, were working under the orders and directions of the outside foreman, George Hoflich, and were required to obey the orders and directions of such outside foreman, then the outside foreman was a vice-principal of the defendant, and if you find that he was negligent in failing to perform the duties which the law imposes on the defendant, as stated in these instructions, if he did so fail, then his negligence, if any, was the negligence of the defendant."

By instruction 28 the court further charged the jury:

"If you find from a preponderance of the evidence that defendant was negligent, under the rules laid down

in these instructions, in failing to exercise reasonable care that the method or rule prescribed for plaintiff to work should be reasonably safe * * or in ordering plaintiff and his coemployees to quit a safe method of work * * for an unsafe method, * * then the mere fact * * that plaintiff followed the rule or method prescribed, or obeyed the order given, is not negligence, unless you find that a reasonably prudent and careful person would not, under similar circumstances, have followed such method or rule or obeyed such orders."

We think the instructions fairly submitted the question to the jury.

14-18. As to assumption of risk under the rules prevailing independent of our statute a servant assumes the ordinary risks and dangers incident to his employment. The jury having found the defendant negligent, assumption of risk is not presumed. Plaintiff did not assume risks occasioned by the negligence of the defendant: *Oberlin v. Oregon-W. R. & N. Co.*, 71 Or. 177 (142 Pac. 554, 557); *Olsen v. Silvertown Lumber Co.*, 67 Or. 167, 176 (135 Pac. 752); *Vanyi v. Portland Flouring Mills Co.*, 63 Or. 520, 530 (128 Pac. 830); *Manning v. Portland Shipbuilding Co.*, 52 Or. 101, 103 (96 Pac. 545). Adams did not assume the risk of injury in obeying the orders of Foreman Hoflich unless a person of ordinary prudence would not have done so; *Millen v. Pacific Bridge Co.*, 51 Or. 538, 555 (95 Pac. 196); *Illinois Steel Co. v. Ryska*, 200 Ill. 280, 285 (65 N. E. 734). The allegations of defendant as to assumption of risk are practically a repetition of those relating to contributory negligence. The defendant does not allege that the duties of plaintiff required him to place himself opposite the car door and pick up lumber while Freeman was throwing it out, but, on the contrary, that Adams carelessly and negligently did so without

giving Freeman any signal to stop, and, as the evidence of defendant purports to claim, in violation of instructions. This was a matter of dispute which was properly tried out as alleged contributory negligence, and should not be classified under assumption of risk: *Oberlin v. Oregon-W. R. & N. Co.*, 71 Or. 177 (142 Pac. 557). There is no allegation that plaintiff's fellow-servant, Freeman, was negligent, and there is practically no proof whatever that any wrongful act of his caused the injury to Adams. There was evidence sufficient to be submitted to the jury and to support the verdict; therefore there was no error of the trial court in denying the motion for a nonsuit and in refusing to direct a verdict in favor of defendant.

As stated in the brief of counsel for defendant, the instructions excepted to involve the same questions and are governed by the same principles of law as those raised by the motions, to which reference has been made, and they do not require separate discussion. Suffice it to say a careful examination of the charge to the jury leads us to believe that the case was fairly and plainly submitted to them. As to additional questions, the same may be said of defendant's motion for a new trial as presented to us in its brief.

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE HARRIS concur.

Argued October 5, reversed October 22, rehearing denied November 16, 1915.

CAMP & DUPUY v. LAUTERMAN.

(152 Pac. 288.)

Exceptions, Bill of—Incorporating Evidence.

1. Failure to include all of plaintiff's testimony in a bill of exceptions does not prevent hearing the question of nonsuit, since Article VII, Section 3, of the Constitution as amended, is complied with by attaching all testimony to the bill of exceptions.

Contracts—Performance—Sufficiency—Building Contracts.

2. Where a contract required a monthly statement of account "covering labor, materials," etc., used in a building, and that "all receipted vouchers" be turned over by the contractor to the owner, the contractor's failure to take vouchers for labor is failure to substantially perform the contract, and he cannot recover an alleged unpaid balance, although canceled checks are offered in lieu of vouchers to show the payments made for labor.

Payment—"Voucher."

3. A "voucher" is an instrument that shows on what account, or by what authority, a particular payment of money is made, or that services of payee entitle him to the payment, and canceled checks are not vouchers, as they would not show such existence.

[As to when acceptance of checks constitutes payment, see note in 69 Am. St. Rep. 346.]

Contracts—Breach—Acquiescence—Injury.

4. Where plaintiff, a contractor, agreed to furnish to defendant owner vouchers for all labor and material claims paid, and he never secured such vouchers for labor, the fact that defendant was present when laborers were paid, saw that no vouchers were taken, and did not object, does not estop him from setting up the contract, since the plaintiff did not, by reason of such acts of defendant, alter his position to his injury.

From Marion: PERCY R. KELLY, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is an action by Camp & DuPuy, a corporation, against J. H. Lauterman to recover money. The complaint alleges, in substance, that plaintiff and defendant on October 4, 1912, entered into a written agreement which is set out in full as Exhibit A, attached to the complaint, and made a part thereof. The sub-

stance of this contract, so far as it is material here, is that plaintiff was to provide all the materials and perform all the work for the full completion of a residence for defendant. As compensation therefor, it was to retain as a perquisite all cash discounts which might be allowed for the prompt payment of bills for materials, etc., and a cash payment of \$500 to be received upon the completion and acceptance of the work. Section 5 of the contract reads thus:

“It is mutually agreed by and between the parties hereto that the owner shall and will between the 1st and 5th day of each and every month be presented with an itemized statement covering labor, materials, etc., contracted during the preceding month and employed in the erection of said building, and upon receipt of such statement shall advance to said contractors a sufficient sum of money to cover same, and before any further money shall be advanced by said owner all receipted vouchers shall be turned over to him for said preceding month.”

The complaint further alleges that plaintiff complied fully with the terms of the contract, except that it did not turn over to defendant receipted vouchers for labor, and justifies such failure by an allegation to the effect that it did not, and does not, understand that the terms of the contract require such vouchers; that although defendant knew that plaintiff was not obtaining such vouchers, and did not intend to obtain them, he made no demand therefor, and did not notify plaintiff that it would be asked to furnish them, but continued to make payments provided for in the contract until the two final payments became due; that, after the completion and acceptance of the building, plaintiff and defendant, by his duly authorized agent, went over and examined plaintiff's records and ac-

counts, and that it was thereupon agreed by them that plaintiff had received an overpayment of \$61.90 for materials, labor and other expenses incurred, but not including the commission of \$500 to be paid to plaintiff by the terms of the agreement; and that there remained due and owing from defendant the sum of \$438.10 for which judgment is asked.

Defendant's answer admits the execution of the contract, but denies any liability thereunder by reason of the failure on the part of plaintiff to furnish vouchers for the labor account. He then alleges affirmatively that when he was called upon to make his second payment, he demanded the vouchers for labor, but that plaintiff represented that his manner of transacting business made it more convenient not to present labor vouchers until the close of the contract, or until its final statement should be presented to defendant; that he consented to this change in the terms of the agreement, but that the same remained intact as to all other details; that, relying upon plaintiff's promise to so produce vouchers for labor, defendant paid plaintiff, upon statements presented to him from time to time, a sum in excess of \$5,000; that, when plaintiff presented its final statement, it failed and refused to furnish the vouchers for labor, "and its accounts were and are in such a muddle and inaccurate condition that without said vouchers it is impossible to determine what, if anything, this defendant owes plaintiff." Then follow the necessary allegations of a counterclaim which was abandoned at the trial.

Plaintiff's reply, after some denials, admits that it did not furnish to defendant vouchers for labor in the form now demanded, but alleges that it turned over to defendant's authorized agent canceled checks cov-

ering all payments for labor, and that such checks were accepted and retained by defendant. From a judgment for plaintiff this appeal is taken.

REVERSED.

For appellant there was a brief over the names of *Messrs. Bronaugh & Bronaugh* and *Mr. James G. Heltzel*, with oral arguments by *Mr. Jerry E. Bronaugh* and *Mr. Heltzel*.

For respondent there was a brief over the names of *Mr. Willis S. Moore* and *Messrs. McNary, Smith & Shields*, with an oral argument by *Mr. Moore*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. There are several assignments of error, but we deem it necessary to consider only the question as to whether or not the court erred in denying the motion for nonsuit. Plaintiff contends that the question of nonsuit is not before this court by reason of the fact that not all the testimony of plaintiff is included in the bill of exceptions. The entire testimony, however, is attached to and made a part of the bill of exceptions, and since the amendment of the Constitution (Article VII, Section 3), this is sufficient to bring the matter fully before us.

2, 3. It is manifest that there is but one serious issue in the case: Did the plaintiff comply with the terms of the contract sued upon sufficiently to entitle it to recover? Defendant contends that the obligation to furnish vouchers for moneys expended in the employment of labor is an essential element of the agreement, and we think this contention is fully sustained by reading Section 5 thereof. The plaintiff in both complaint and

reply expressly admits that such vouchers were not furnished, and seeks to substitute therefor certain canceled checks, which are simply orders upon a bank for the payment of various sums of money to different persons, without any notation as to the purpose for which they were issued, or upon what consideration. The ordinary meaning of "voucher" is a document which shows that services have been performed or expenses incurred. It covers any acquittance or receipt discharging the person or evidencing payment by him. When used in the connection with disbursement of moneys, it implies some instrument that shows on what account or by what authority a particular payment has been made, or that services have been performed which entitle the party to whom it is issued to payment: 4 Words and Phrases, 1215; *First National Bank of Chicago v. City of Elgin*, 136 Ill. App. 453, 465. The canceled checks referred to are not vouchers in any sense, as they give no information whatever as to their purpose or connection. It is admitted in the evidence that the labor payments must have amounted to at least \$2,000, and consequently there was no question of substantial performance to be submitted to the jury.

4. There is an attempt in the complaint to estop the defendant from demanding the labor vouchers, because he was sometimes present when laborers were paid, and knew that plaintiff was not then taking receipts for such payments, but made no protest. This allegation is not sufficient to constitute an estoppel, since it does not appear therefrom that the alleged acquiescence of the defendant caused the plaintiff to alter its position to its injury. On the contrary, the plaintiff asserts that its failure to secure receipted vouchers

resulted from its interpretation of the terms of the written contract.

The judgment of the trial court will therefore be reversed, and a judgment of nonsuit entered here.

REVERSED. NONSUIT ENTERED.

**MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE
and MR. JUSTICE BURNETT CONCUR.**

Argued June 28, affirmed July 30, 1915.

Rehearing granted September 21, reargued October 11, reversed
November 16, 1915.

TAGGART v. HUNTER.*

(150 Pac. 738; 152 Pac. 871.)

Evidence—Secondary Evidence—Contents of Writing.

1. In an action to recover a broker's commission on a sale of land, wherein plaintiff testified that defendants gave him a written agreement of employment in the form of a letter, in response to a conversation between himself and defendant, and containing the substance of and confirming it, which writing had been lost, plaintiff's testimony as to such conversation was admissible, as being merely a statement of the contents of the writing.

Frauds, Statute of—Requisites of Memorandum—Sale—Price.

2. In an agreement of sale the memorandum must contain the full terms of the contract, and state the price, though if it recites that the price has been received, or if no price is named in the contract, or if the property has been sold for what it is reasonably worth, a statement of the price is unnecessary.

Frauds, Statute of—Requisites of Memorandum—Consideration.

3. The memorandum required by the various subdivisions of the statute of frauds (Section 808, L. O. L.) is not the contract itself, but is only evidence of the contract, showing the terms and parties, and if the law imports a consideration for a contract within the statute, no consideration need be stated in the memorandum.

Brokers—Compensation—Statute of Frauds—Sufficiency of Memorandum.

4. Under Section 808, subdivision 8, L. O. L., providing that an agreement authorizing or employing an agent or broker to sell real

*On written authorization by broker or agent to buy or sell land as a memorandum of contract of sale sufficient to satisfy the statute of frauds, see note in L. E. A. 1915C, 400.

estate for compensation or a commission shall be void unless it, or some memorandum thereof, expressing the consideration, be in writing, subscribed by the party to be charged or by his lawfully authorized agent, and that evidence of the agreement shall not be received other than the writing or secondary evidence of its contents, a parol contract definite enough to be enforced is enforceable if reduced to writing and signed by the party to be charged; and a lost written agreement of employment which, as established, named the principal, mentioned the agent, described the land, stated the price for which it was to be sold, and authorized the agent to sell the land, subscribed by the principal, though not expressing any compensation to be paid the agent, when accepted and acted upon by procuring a purchaser, was a binding contract.

Brokers—Contracts—Compensation.

5. Under a broker's employment to find a purchaser of land for a commission, where the compensation was not stated therein, the law implied an agreement to pay what it was reasonably worth.

[As to when a broker becomes entitled to a commission, see note in 28 Am. St. Rep. 546.]

Appeal and Error—Review—Motion for Nonsuit—Evidence.

6. In the consideration of a motion for a nonsuit, where the record contains all the evidence produced upon the trial, the Supreme Court must consider the entire evidence.

Witnesses—Cross-examination—Scope.

7. In an action to recover a broker's commission upon a sale of real estate, the cross-examination of the defendant in regard to the delivery of a plat to the plaintiff was not objectionable, where it related strictly to the matter brought out on his examination in chief.

Appeal and Error—Questions of Facts—Nonsuit.

8. Under Article VII, Section 3, of the Constitution, as amended in 1910 (see Laws 1911, p. 7), providing that no fact tried by a jury shall be otherwise re-examined in any court of the state, unless the court can affirmatively say there is no evidence to support the verdict, where the Supreme Court cannot say that there was no competent evidence to support a verdict, it cannot hold error in overruling a motion for a nonsuit or a directed verdict.

Brokers—Compensation—Statute of Frauds—Sufficiency of Memorandum.

9. Under Section 808, L. O. L., declaring void certain agreements, including one authorizing or employing an agent or broker to sell real estate for compensation or a commission, unless the same, or a memorandum thereof, expressing the considerations, be in writing, and subscribed by the party to be charged, the written authorization to a broker to sell real estate must state the compensation to be paid him.

[As to what constitutes memoranda and by whom must be signed, see note in 47 Am. Rep. 532.]

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE BENSON.

This is an action by J. W. Taggart against J. N. Hunter and William Staats to recover a broker's commission on a sale of real estate. Defendants appeal from a judgment on a verdict for \$4,500 in favor of plaintiff. The complaint alleges that the defendants employed the plaintiff to procure purchasers for certain timber lands, and agreed to pay him a reasonable compensation therefor; that he procured the purchasers; that \$5,000 is a reasonable compensation; that \$500 was paid thereon and no more.

All of these allegations are denied by the answer.

REVERSED. AFFIRMED ON REHEARING.

For appellants there was a brief over the name of *Messrs. Veazie, McCourt & Veazie*, with an oral argument by *Mr. Arthur L. Veazie*.

For respondent there was a brief over the names of *Mr. Martin L. Pipes, Mr. George A. Pipes* and *Mr. John B. Ryan*, with oral arguments by *Messrs. Pipes & Pipes*.

MR. JUSTICE BEAN delivered the opinion of the court.

The errors assigned relate principally to the sufficiency of the evidence under the statute of frauds and to the admission of oral evidence, which the defendants maintain was barred by Section 808, subdivision 8, L. O. L. From the bill of exceptions it appears that upon the trial plaintiff testified to a verbal employment of himself to sell the lands. Upon objection being made counsel for plaintiff stated that a writing had been given, but was lost, offered to prove the contents thereof, and introduced evidence tending to show that

the memorandum had been mislaid and could not be found. The substance of plaintiff's testimony as to the contents of the agreement, introduced over defendants' objection, was as follows:

"I met Mr. Hunter on the sidewalk in Bend, and I told him I had a buyer for a tract of yellow pine timber, and I wanted to know if he knew of any. He says, 'Yes, John; we have got the best tract in Oregon.' I says, 'How much is it?' He says, 'Practically 27,000 acres.' And he says, 'We have got it'—no, excuse me. I asked him if he could deliver it, and he told me they could, that they had it tied up with an option, but their time was very short, and they had to handle it quick, or they would lose it. 'Well,' I says, 'how much will it take to handle it?' and he says, 'about half a million dollars.' 'Well,' I says, 'I have only one party to present this to, and they are good people.' I says, 'I think that they are able to handle it.' And he wanted to know where they were. I told him that the secretary and treasurer of the company was here in Portland, and that he was the only man that I wanted to present it to; that the tract would not be peddled around, but that I would have to have written authority to present this tract to them, because he would not allow any bullconning. * * He told me he would give it to me. I says, 'Now, if you will fix that up, authorizing me to sell this tract of timber, and state in it a preliminary of what the tract contains, and so forth, and so forth, so I can present it intelligently, and give me the writing, I will take it to Portland.' "

Thereupon plaintiff testified that defendant Hunter gave him a writing in response to the conversation at the office of the defendants. When asked what the letter contained, Taggart stated that it was in effect as follows: J. W. Taggart: "I hereby authorize you to sell this tract of yellow pine timber," located in Crook County, a plat of which is inclosed, and stating how many thousand acres of the land could be cultivated

after the timber was all off, how many thousand feet it cruised to the acre, about the number of logs it was, surface cleared, and the price, \$22.50 per acre. "[Signed] Hunter & Staats." Thereupon plaintiff stated that he took the letter and plat to a Mr. Noud, secretary and treasurer of the Noud-Blacker Timber Company, in Portland, a prospective purchaser, and left them with him. Afterward, in August, Mr. Noud and one Larry S. Franck went to Bend, from which place plaintiff went with them to where Mr. Hunter was taking a vacation on the Metolius River, about 30 miles away, and introduced them to Mr. Hunter. They examined the timber land and had the timber cruised. A stock company composed of Mr. Noud, his father, and associates was formed, and a sale was made to them. Negotiations were pending until about the next December, and considerable correspondence between plaintiff and Noud in regard to the transaction appears in the record. After the deal was closed defendants paid plaintiff \$500 for his services, he protesting that nothing less than \$5,000 was sufficient; that this amount was a reasonable compensation. Defendant Hunter told plaintiff that it was "an awful lucky thing that you got those fellows," and that there would be a big thing in it for plaintiff if the deal went through. Hunter was called as a witness for plaintiff, and testified that the land in question was sold by L. S. Franck to the Northwestern Timber Company for \$488,000; that he and Mr. Staats, who are real estate dealers, received about \$23,000 profit from the deal, \$10,000 of which was stock in the corporation; that they held an option on the land for which they paid \$500. Defendants objected to all this testimony, moved to strike it out for the reason stated, and at the close of plaintiff's case moved for a nonsuit upon

the ground that the evidence was not sufficient to be submitted to a jury, which motions were denied. Thereupon defendants introduced evidence tending to show, among other things, that defendants paid plaintiff \$500, for the reason that Mr. Noud took \$5,000 of stock in the purchasing company. Defendant Hunter also testified on behalf of the defendants in part as follows:

"I never told the plaintiff I would give him anything he might ask, or words to that effect, in case he found a buyer for this land, or anything of the kind. His testimony in that respect is not true. At the time I gave him the map or plat containing a description of the land, the only writing I gave him, according to the best of my knowledge, was just a description of the land, telling how many acres there were in the tract, about 22,101 acres. * * I could not say whether there was a letter, or whether it was written on the plat. * * He was down at Portland about a week, and when he came back he said, 'Boys, I am sorry I could not do anything with the land in Portland.' He said that he put it up to Mr. Noud, but that the tract was too large for him to handle, so we did not think anything more about it."

Hunter stated that the \$500 was paid to the plaintiff as a present because of the fact that Mr. Noud had taken \$5,000 of the stock of the purchasing company. On cross-examination, he testified that defendants gave the plaintiff the plat because he said, "I am going to Portland, and I might be able to do something with this land for you"—that he might find them a buyer. Thereupon the witness was asked this question: "Q. Well, what did you give it to him for?" To this question the defendants objected on the ground that oral evidence is incompetent to prove the employment of plaintiff, which objection was overruled by the court,

and the defendants saved and were allowed an exception to the ruling, whereupon the witness answered:

“A. Well, he said he thought he could get us a buyer for this land, and that was the object. We thought we would give it to him and let him try. We knew he could not do anything without a plat or a description of the land. We would have been glad for him to furnish us a buyer. We intended for him to get a buyer if he could. We gave him a description of the land in writing, with the price, \$24 an acre, and let him bring it to Portland.”

The defendant W. H. Staats was called as a witness on behalf of the defendants, and, being sworn, testified as follows:

“I saw the plat and the writings that were delivered to Mr. Taggart about the 10th of July, 1910, which he has testified about and which he brought down to Portland to show to Mr. Noud. The land that we had an option on was blocked off on the plat with red ink, and we wrote a little description, telling the number of acres, 22,101, and the lay of the land, and that it was good grazing land after the timber was taken off, and that is about all there was on that plat. There was no other writing besides the plat. The price was stated, \$24 per acre.”

On cross-examination, this witness stated that the writing given plaintiff was written by Mr. Hunter, but was not signed; that it did not indicate that Mr. Hunter had the land for sale, but was just a piece of paper with the price on it; that defendants knew plaintiff was coming to Portland, and expected him to use the plat; that plaintiff asked defendants for the plat, and said:

“‘I am going to Portland, boys, and I understand you have got some yellow pine timber to sell.’ We told him we had, and he said, ‘If you will make me a plat of it, I will take it along, and maybe I can do

something with it.' We gave it to him on those terms, and he took it along."

No objection was made to the cross-examination of Mr. Staats.

It is contended by counsel for plaintiff that the direct and cross-examination of defendants discloses the contract of employment alleged in the complaint; that no express promise to pay was necessary to be proved (citing *Kiser v. Holladay*, 29 Or. 338 [45 Pac. 759]); that where a party admits the existence of an agreement within the statute of frauds, or permits parol evidence of its contents to be proved without objection, he waives his right to require a writing (citing *Sorenson v. Smith*, 65 Or. 78, 92 (129 Pac. 757, 131 Pac. 1022, Ann. Cas. 1915A, 1127, 51 L. R. A. (N. S.) 612); *Scofield v. Stoddard*, 58 Vt. 290 (5 Atl. 314); *Livermore v. Stine*, 43 Cal. 274).

1. It is first urged by defendants that the trial court erred in permitting the plaintiff to state the conversation between himself and defendant Hunter in regard to employment. If this were all, there would be grounds for the objections, but when we consider that the plaintiff further testified that the defendants gave him a writing in the form of a letter "in response to said conversation," meaning, as we construe the evidence, that the writing contained the substance of and confirmed the same, it appears to be stating the contents of the writing backward, and is not a reversible error: *Fisk v. Henarie*, 13 Or. 156 (9 Pac. 322).

We come then to the important and often troublesome question as to the sufficiency of the writing to take the case out of the statute of frauds or the waiver of any defect therein or want of writing by defendants. Section 808 provides, in part, as follows:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * 8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

2. As an illustration, in an agreement of sale, the memorandum must contain the full terms of the contract; the price should be stated, but if it contains a recital that the price has been received, it is then unnecessary. It is also unnecessary if no price has been named in the contract, or the property has been sold for what it is reasonably worth: 3 Jones Ev., § 429; *Hoadly v. McLaine*, 10 Bing. 482; Browne, Stat. Frauds (5 ed.), § 377; *Chase v. Lowell*, 7 Gray (Mass.), 33.

3. It should be borne in mind that the memorandum required in the various sections of the statute is not the contract itself. The writing is only the evidence of the contract showing the terms and parties: 3 Jones, Ev., § 430. If the law imports a consideration for a contract falling within the statute of frauds, no consideration need be delineated in the memorandum thereof: 20 Cyc. 263. It was said by Mr. Chief Justice LORD in *Johnston v. Wadsworth*, 24 Or. 494, 503 (34 Pac. 13, 15) after referring to our statute as it was then:

"The object of the statute of frauds was to prevent the facility to fraud and perjury to which contracts dependent upon the memory of witnesses were exposed, by requiring them to be reduced to writing. When this is done, there does not seem to be any rea-

son why the consideration might not be proved by parol, as in the case of any other contract, or, if there is any reason for expressing the consideration, the true one ought to be expressed, yet the authorities cited show that the words 'for value received,' or that a seal itself, sufficiently expresses the consideration."

In that case no consideration for the agreement to purchase real property was expressed in the memorandum except by the seal of the defendant.

4-6. The statute of frauds, particularly subdivision 8, which is the amendment of 1909, requires that some note or memorandum of the agreement, "authorizing or employing" an agent or broker to sell or purchase real estate for a compensation, be in writing. A parol contract which was definite enough to be enforced before the amendment was enacted is enforceable since the statute was passed, if it is reduced to writing and signed by the party to be charged. In the case at bar the action is based upon the agreement of defendants to employ plaintiff to sell their lands. The principal is named, the agent is mentioned, the land is described, and the price or consideration for which the property is to be sold, given. What the agent is to do clearly appears, viz., to sell the land. "It was subscribed by the party to be charged." There is another element of the contract, the compensation of the agent, that may or may not be definitely agreed upon. If it is agreed upon, it becomes one of the terms of the agreement, and should be stated in the memorandum, and, if not, the law implies an agreement to pay what it is reasonably worth. The statutes of Nebraska and New Jersey require the compensation to be fixed and stated in the agreement. No express provision to pay was necessary to be proved: *Kiser v. Holladay*, 29 Or. 338 (45 Pac. 759). The compensation for the services to be

performed is the price thereof. It should not be confounded with the consideration for the promise or employment: *Jones, Ev.*, § 429, p. 128. The consideration for the agreement which is clearly inferable from the terms of the memorandum was that plaintiff should find a buyer for the timber lands if he could. There was evidence tending to show, and the jury might reasonably find from the writing in effect, that defendants authorized plaintiff to sell their lands if he could find a purchaser for the same. When this proposal was accepted and acted upon by the plaintiff in procuring a purchaser who purchased the land and defendants paid plaintiff \$500 therefor, it became a binding recognized contract: *Henderson v. Lemke*, 60 Or. 363 (119 Pac. 482). It cannot be successfully contended that it was necessary for the promisee, Taggart, to sign the memorandum or accept the proposition in writing. No particular form of words expressive of the consideration for the grant of authority to sell real property need be written in the memorandum, but the consideration must nevertheless appear: *Johnston v. Wadsworth*, 24 Or. 494, 503 (34 Pac. 13, 15); *Church v. Brown*, 21 N. Y. 315, and cases there cited. If from a reasonable construction of the instrument the consideration is necessarily inferable from the terms thereof, it is expressed within the meaning of the statute.

The defendants, after plaintiff had rested his case, introduced evidence tending to show the employment of plaintiff and the transaction of furnishing him with the plat and description of the timber lands in order that he might make the sale. In the consideration of the motion for a nonsuit, where the record contains all the evidence produced upon the trial, as it does in this case, we must consider the entire evidence: *Trickey v.*

Clark, 50 Or. 516 (93 Pac. 457); *Crosby v. Portland Ry., L. & P. Co.*, 53 Or. 496 (100 Pac. 300, 101 Pac. 204); *Oberstock v. United Rys. Co.*, 68 Or. 197, 204 (137 Pac. 195); *Taylor v. Taylor*, 54 Or. 560, 568 (103 Pac. 524). The amendment to the statute of frauds was enacted for the purpose of preventing real estate brokers from fraudulently claiming a commission when they were not authorized in writing to make the sale. It was not the legislative intent to require any more specific or technical employment or authorization for a broker to act than had been theretofore necessary. It was the main object that such authority should be proven by a writing or secondary evidence of its contents. The law seems to contemplate that the authorization of a broker to sell land should be in the ordinary form used by men in business. It may be informal as long as it complies with the statutory requirements. Such memorandum should receive a practical construction. Taggart could not, in the nature of affairs, agree to sell the land: *Brown*, Stat. Frauds, § 353a. The writing proven by plaintiff to have been executed by defendants Staats and Hunter was sufficient to carry out the spirit and letter of the statute and take the case out of the statute: *Straight v. Wight*, 60 Minn. 515 (63 N. W. 105); *Brewer v. Horst-Lachmund Co.*, 50 L. R. A. 240, note.

7. The cross-examination of defendant Hunter in regard to the delivery of the plat to plaintiff related strictly to the matter brought out on his examination in chief, and was not objectionable.

8. Guided by Article VII, Section 3, of the Constitution as amended in 1910 (see Laws 1911, p. 7), we cannot say there was no competent evidence to support the verdict; therefore there was no error in overruling

the motion for a nonsuit or directed verdict. It follows that the judgment of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE and MR. JUSTICE EAKIN concur.

MR. JUSTICE HARRIS dissents.

Reargued on rehearing October 11, reversed November 16, 1915.

ON REHEARING.

(152 Pac. 871.)

On rehearing there was a brief for appellants over the name of *Messrs. Veazie, McCourt & Veazie*, with an oral argument by *Mr. Arthur L. Veazie*.

For respondent there was a brief over the names of *Messrs. Pipes & Pipes* and *Mr. John B. Ryan*, with oral arguments by *Mr. Martin L. Pipes* and *Mr. George A. Pipes*.

In Banc. MR. JUSTICE BENSON delivered the opinion of the court.

9. Upon the rehearing we have considered but one question: Is the alleged memorandum sufficient to take the case out of the statute of frauds? The first paragraph of the Oregon statute of frauds reads thus:

“In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or

secondary evidence of its contents, in the cases prescribed by law": Sec. 808, L. O. L.

Then follows an enumeration of the cases to which the law is applicable. No. 8, the one pertinent herein, was added to the statute in 1909, and reads thus:

"An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The memorandum relied upon in the present case was sought to be established by secondary evidence of its contents, the paper having been lost or destroyed. The plaintiff testified that it read substantially as follows:

"J. W. Taggart:

"I hereby authorize you to sell this tract of yellow pine timber, located in Crook County, a plat of which is inclosed, and stating so many thousand acres of the land could be cultivated after the timber was all off, how many thousand feet it cruised to the acre, about the number of logs it was, surface cleared, and the price \$22.50 per acre.

"[Signed] HUNTER & STAATS."

This statement, reduced to its simplest terms, is an authorization of plaintiff to sell a particular tract of land at a specified price per acre. It is signed by the party sought to be charged, and, if it expresses the consideration, it is sufficient. The problem submitted then is: What is the true interpretation of the statute? To an unsophisticated layman, reading the two clauses of the law above quoted, it would undoubtedly mean that, if I sell my services as a real estate broker, I cannot recover therefor, unless I have a written memorandum signed by my employer specifying the land I am to sell and the compensation I am to receive for

bringing about such sale. It would further impress the aforesaid layman that I must also rely upon the written memorandum as the sole evidence of any agreement to pay me for my services; for in such an agreement it is not apparent that there are any other essential elements.

“The party to be charged” is necessarily the one against whom enforcement of the agreement is invoked, and the only consideration which can be expected from him is to pay for the broker’s services. In the case of *Fisk v. Henarie*, 13 Or. 156 (9 Pac. 322), the court, speaking of a similar agreement, says:

“The writing in such case need not be signed by both parties, nor contain any terms further than that, if the broker will procure such purchaser, he will be allowed a stated commission.”

This interpretation is adopted in the case of *Sorenson v. Smith*, 65 Or. 90 (129 Pac. 761, 131 Pac. 1033, Ann. Cas. 1915A, 1127, 57 L. R. A. (N. S.) 612), wherein Mr. Justice MOORE says:

“It is thought that the primary object that induced the enactment of our statute, hereinbefore quoted, demands that, where the original contract respecting the broker’s compensation was not in writing, as required, the ratification can only be by a writing.”

Again, in the opinion upon rehearing, the same learned justice says:

“Because George Sorenson, the plaintiff’s assignor, was employed by, and was the subagent of, F. A. Kribs, then no privity of contract existed between such substituted agent and the defendant, Charles A. Smith, and the latter, never having stipulated in writing to pay a commission to the subagent, did not by negotiating the sale of the lands to C. P. Bratnober and the Storey-Bracher Lumber Company ratify Krib’s employment of Sorenson.”

In the late case of *Taylor v. Peterson*, 76 Or. 77, (147 Pac. 520), Mr. Justice BURNETT, after quoting the language of our statute, stated:

“In this respect our Code is more stringent than any other to which our attention has been directed. In mandatory language it forbids proof of any kind other than the writing, yet here the plaintiff would rely upon the oral testimony entirely, unless we may except the newspaper article to which reference has been made. As already pointed out, that does not satisfy the statute, because, for one thing, it does not express the consideration.”

In that case the writing signed by the party to be charged said:

“Several weeks ago I made a tender to the authorities through my agent, J. A. Taylor, of my property,” referring to property elsewhere described in the article.

It is true that in the decisions there can be found some dicta indicating that the writers are not in full harmony with some of the provisions of the statute of frauds, and would be satisfied with a very slight performance of its requirements. Nowhere do we find any encouragement for the doctrine that its provisions or any one of them can be entirely ignored with impunity. The decisions of other states are of slight value to us in the solution of this problem, by reason of the diverse language used in their statutes. The first important particular in which the statutes differ may be best appreciated by noting the fact that the Oregon statute declares the agreements in the cases mentioned to be void. We find this to be the case in only eight other states, viz.: Alabama, Michigan, Nebraska, Nevada, New York, Washington, Wisconsin and Wyoming. In California, North Dakota, South Dakota and Montana the contract is declared to be “invalid,”

or "not valid." The remaining states declare either that no evidence other than the writing is competent in the cases specified, or that no action shall be maintained thereon. It will be observed that in our state, and in the few others named above as in the same class, the law challenges the vitality of the contract or agreement, while in the others the statute affects only the remedy. The true interpretation of our law is clearly expressed in the case of *Pierce v. Clarke*, 71 Minn. 121 (73 N. W. 523), in which the following language occurs:

"The English statute of frauds differs from ours. That provides that no action shall be brought upon such contracts unless they are in writing, and signed by the party to be charged. * * In some instances—perhaps in many—under the English statute, such contracts would not be absolutely void, as under ours. It is proper here to call attention to an erroneous statement as to the effect of our statute found in the case of *Hagelin v. Wacks*, 61 Minn. 214, 216 (63 N. W. 624). The writer hereof, who wrote the opinion in that case, stated that the statute of frauds does not declare oral contracts as to estates or interests in lands void, but merely that they are not enforceable by action, citing *Trowbridge v. Wetherbee*, 11 Allen (Mass.), 361; *Lowman v. Sheets*, 124 Ind. 416 (24 N. E. 351, 7 L. R. A. 784). Such is not the law under our statute, because it makes such contracts void. Evidently the writer had in mind the English statute, which does not declare such contracts void, but nonenforceable by action"—citing *Madigan v. Walsh*, 22 Wis. 501, to the same effect.

It seems clear that, if a parol agreement is void under the statute of frauds, no blunder, or even intentional admission of incompetent evidence, could vitalize the contract to such an extent as to justify a recovery thereon. The authorities called to our attention which appear to sustain the converse theory are either

from states whose law does not declare such contracts void, or are in the same category with the case of *Hagelin v. Wacks*, 61 Minn. 214, 216 (63 N. W. 624), which the Supreme Court of Minnesota so frankly repudiates. Quoting again a Minnesota case, *Taylor v. Allen*, 40 Minn. 433, 434 (42 N. W. 292), we read as follows:

“The plaintiff suggests that the written memorandum in this case is aided or supplemented by certain admissions in the answer. But these will not help matters. It is now the settled law that the defendant can have the benefit of the statute, even if he admits an oral agreement. He may admit a verbal agreement, and yet assert its invalidity”—citing *Browne, St. Frauds*, § 509; *Wilson S. M. Co. v. Schnell*, 20 Minn. 40 (Gil. 33).

We have examined with great care the authorities cited by respondent, and do not find that they sustain his contention. The case of *Kiser v. Holladay* 29 Or. 338 (45 Pac. 759), is cited to sustain the doctrine that no express promise to pay is required to be included in the memorandum. That was an action to recover on a *quantum meruit* for work and labor, and therefore is not in point; for no one will contend that a person may not recover upon an implied promise, unless the statute requires the promise to be in writing. The case of *Sorenson v. Smith*, 65 Or. 78 (129 Pac. 757, 131 Pac. 1022, Ann. Cas. 1915A, 1127, 57 L. R. A. (N. S.) 612), which is relied upon to support the contention that the defense of the statute is waived by admitting without objection any evidence tending to support the parol contract, does not, we think, sustain this doctrine. It is true that in the opinion upon the rehearing (65 Or. 92 (131 Pac. 1023, Ann. Cas. 1915A, 1127, 57 L. R. A. (N. S.) 612), the court says:

“In the former opinion the testimony admitted without exception was deemed competent, and it was also considered that the statute of frauds, as far as it related to Sorenson’s employer was waived by not objecting to the admission of testimony tending to show that the contract sued upon was not evidenced by any writing.”

A careful examination of the entire opinion discloses the fact that this statement was not necessary to the decision, which was based upon the fact that an examination of all the evidence failed to disclose a case sufficient to go to the jury. The case of *Scofield v. Stoddard*, 58 Vt. 290 (5 Atl. 314), is not in point, for the reason that the Vermont statute does not declare such contracts void, but simply states that “no action shall be brought,” etc. The case of *Livermore v. Stine*, 43 Cal. 274, is not of any practical value, for the reason that the court distinctly says that the contract then under consideration was not within the statute of frauds, and its statement in regard to waiver is pure *dictum*. It may also be noted that the California statute does not use the term “void,” but declares such contracts to be “invalid.” In the case of *Fisk v. Henarie*, 13 Or. 156 (9 Pac. 322), it will be noted there was a writing signed by the party to be charged describing the land, naming the price at which it was to be sold, and specifying the commission to be received by the broker. It will further be observed that this case was determined under the California statute, which differs from ours in that it employs the following language:

“Evidence, therefore, cannot be received, without the writing, or secondary evidence of its contents.”

In the case of *Johnston v. Wadsworth*, 24 Or. 494 (34 Pac. 13), the court held that the instrument sued

upon, being under seal, imported a consideration and was a sufficient memorandum. The remarks of the learned justice who wrote the opinion in regard to parol evidence do not purport to be a declaration of the law, but a criticism of its logic. There were other cases cited upon various points, but these we have referred to are sufficient to disclose the nature of the authorities relied upon.

However we may regard the statutes of our state, we are not at liberty to repeal them by interpretation.

The judgment of the trial court is reversed and the action dismissed.

REVERSED ON REHEARING. ACTION DISMISSED.

MR. JUSTICE HARRIS concurs in the result.

MR. JUSTICE BEAN delivered the following dissenting opinion:

I am still of the opinion that the written authorization shown by the evidence expresses the consideration and complies with the statute. I therefore adhere to the former opinion herein.

Argued September 21, affirmed October 5, rehearing denied November 16, 1915.

PETERSON v. THOMPSON.

(151 Pac. 721; 152 Pac. 497.)

Bills and Notes—Indorser's Liability—Statute.

1. Under Section 5899, L. O. L., providing that every indorser without qualification warrants to all subsequent holders in due course that the indorsement is genuine and in all respects what it purports to be, that he has good title to it, that all prior parties had capacity to contract, and that the instrument is at the time of his indorsement valid and subsisting, and providing that, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the

necessary proceedings duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it, where defendants indorsed a mortgage note without qualification, they were liable thereon, unless the note had been previously paid or otherwise satisfied.

[As to indorsement in blank by person other than payee or holder, see note in 29 Am. St. Rep. 297.]

Bills and Notes—Payment—Burden of Proof.

2. Payment being an affirmative defense, in suit to foreclose a mortgage, seeking a personal judgment against indorsers of the mortgage note, it was incumbent on such indorsers to prove payment by the preponderance of the evidence.

Appeal and Error—Reservation of Grounds of Review—Objection to Evidence.

3. Where testimony was excluded, but no offer was made to have it taken and incorporated in the record, subject to the objection, the objection could not be urged on appeal.

Bills and Notes—Mortgage Note—Liability of Indorsers—Sale of Equity of Redemption.

4. Where the sale of mortgaged premises by the administrator of the deceased mortgagor, in effect, conveyed the equity of redemption remaining in the estate of the maker, such sale, while it exhausted the estate, did not discharge its liability on the note, and the indorsers on such note were not discharged.

From Douglas: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit by Etella Peterson against Emma B. Thompson, W. C. Harding Land Company, a corporation, W. C. Harding and Ada Harding, husband and wife, to foreclose a mortgage against a tract of land in Douglas County, Oregon, and in addition to secure a personal judgment against the defendants, W. C. Harding Land Company and W. C. and Ada Harding, husband and wife. The note which was secured by the mortgage was given by C. J. Stovin to W. C. Harding Land Company. The note and mortgage were later sold by the W. C. Harding Land Company to plaintiff; the note being indorsed as follows:

“Pay the within note to Etella Peterson, or order.
W. C. Harding Land Co. W. C Harding, Pres. L.
W. Wallace, Sec’y.”

There was also this further indorsement:

"Presentment notice and protest are waived. W. C. Harding. Ada Harding."

The complaint alleged, in substance, that the mortgage was given by C. J. Stovin and wife to secure a promissory note executed by Stovin to the W. C. Harding Land Company for \$4,500, with 6 per cent interest from date, upon which note there were indorsements showing payment of interest to December 7, 1911, amounting to \$550.80, and upon the latter date a payment upon the principal of \$590. The complaint then set up the death of Stovin prior to the commencement of this suit, and alleged that A. N. Orcutt, his administrator, duly sold the mortgaged premises at administrator's sale to defendant Emma B. Thompson for \$250, and that Stovin's widow conveyed all her right, title and interest to Emma B. Thompson, who was alleged to be the owner of the property subject to the mortgage in suit and another mortgage mentioned in the complaint. The complaint also alleged the assignment of the mortgage in suit to plaintiff; that the mortgage is subsequent and inferior to another mortgage executed by the Stovins to the W. C. Harding Land Company and assigned through various parties to Alice I. Thompson, who is now the owner and holder of it. The presentment, nonpayment of the note in suit, and the notice thereof were duly alleged. The complaint contained the further allegation that said note was assigned and delivered by the W. C. Harding Land Company and indorsed by the defendants W. C. and Ada Harding for the purpose of paying a sum of money due to the plaintiff from the defendant W. C. Harding Land Company; that said note was taken by plaintiff on the credit of such indorsement;

and that defendants W. C. and Ada Harding indorsed said note for the purpose of procuring for the said W. C. Harding Land Company a credit with plaintiff knowing that it would be so applied.

The answer formally denied that the mortgaged property had been sold to Emma B. Thompson or that she was the owner of it; that there was any sum due or unpaid upon the note; the various assignments of the other mortgage; and Alice I. Thompson's ownership thereof. It contained the following affirmative defense:

“That the plaintiff, being the owner and holder of the notes and mortgages set out in plaintiff's complaint, purchased the land therein described from the administrator of the estate of said C. J. Stovin, deceased, and that the consideration for the purchase of said land was the indebtedness of the said C. J. Stovin and Fannie B. Stovin, his wife, as evidenced by the promissory notes described and set out in plaintiff's complaint, and in purchasing said real property from the said A. N. Orcutt, administrator of the estate of said C. J. Stovin, deceased, paid to the said Orcutt a nominal sum only, to wit, the sum of two hundred (\$200) dollars; that in the purchase of said real property the said Etella Peterson received the deed and transfer and conveyance thereof from the said administrator of the estate of said C. J. Stovin, deceased, in full payment and satisfaction of the indebtedness evidenced, mentioned, and set out in plaintiff's complaint; that for the purpose of overreaching, cheating, and wronging these answering defendants, and particularly the answering defendants W. C. Harding and Ada Harding, said Etella Peterson caused the said sale of said premises to be reported to the county court by said A. N. Orcutt, administrator aforesaid, as though made to the defendant Emma B. Thompson, and thereafter caused the deed to said premises to be made to the said defendant Emma B. Thompson for said plaintiff, Etella Peterson; that the said plaintiff,

Etella Peterson, is now owner and holder of the title to said premises in truth and in fact, and the said defendant Emma B. Thompson holds the title in trust for the use and benefit of the said plaintiff, Etella Peterson; that these answering defendants are informed and believe and therefore allege, that the said plaintiff, Etella Peterson, and the defendant Emma B. Thompson are sisters; that by reason of the sale of the said premises described in plaintiff's complaint by said A. N. Orcutt to the plaintiff, as aforesaid, the persons primarily liable on the notes set out in plaintiff's complaint and described therein, to wit, the estate of C. J. Stovin and Fannie Stovin, were discharged and said notes thereby fully paid and satisfied, and these answering defendants were thereby released and discharged from any and all liability incurred by the indorsement of said promissory notes. Wherefore these answering defendants, having duly answered plaintiff's complaint, pray for the decree and judgment of this court dismissing said complaint and awarding judgment against the plaintiff for these defendants' costs and disbursements herein to be taxed."

The reply denied all the new matter set up in the answer, except the allegation that plaintiff and Emma B. Thompson were sisters. The trial resulted in findings and decree for plaintiff, and defendants appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. Oliver P. Coshow*.

For respondent there was a brief over the names of *Mr. M. Morehead* and *Messrs. Christopherson & Matthews*, with an oral argument by *Mr. Q. L. Matthews*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. The indorsement of defendants was without qualification, and, therefore, in the regular course of

business, they are liable unless the note had been previously paid or otherwise satisfied: Section 5899, L. O. L. Payment being an affirmative defense, it was incumbent upon the defendants to prove such defense by the preponderance of the evidence: *Willis v. Holmes*, 28 Or. 265 (42 Pac. 989). While there is some respectable evidence tending to show that the purchase of the property was made for plaintiff's benefit and with the understanding that the mortgages upon the property were to be extinguished thereby, we are of the opinion that the weight of testimony is to the effect that the property was bought by Emma B. Thompson with her own money and for her own benefit; and, this being the case, it follows that defendants' affirmative defense is not established, and the plaintiff is entitled to recover.

3. Error is assigned by reason of the ruling of the court excluding certain testimony offered by defendants, but, as no offer was made to have the testimony taken and incorporated in the record subject to the objection of defendants, under the rule announced in *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135), they are precluded from urging the objection on appeal.

The decree is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and
MR. JUSTICE BENSON concur.

Denied November 16, 1915.

ON PETITION FOR REHEARING.

(152 Pac. 497.)

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

4. The defendants Harding, who appealed, were indorsers of the note named in the mortgage foreclosed in this suit. They contend that the sale of the mortgaged premises by the administrator of the deceased maker of the note discharged the principal debtor, and consequently released the indorsers, who were only secondarily liable. They endeavor to work out this result exonerating the maker through some correspondence between the attorney for the estate and the attorney for the plaintiff written prior to the sale, which they say proves that its terms included the assumption by the purchaser of the payment of the note and mortgage involved in this suit. Nothing can be derived from this correspondence beyond negotiation. Except the indorsement of the defendants on the note, no writing appears in evidence signed by anyone agreeing to assume or pay the debt of Stovin, the maker of the note. It is not disclosed that the administrator's deed which is the culmination of the transaction, and in which all previous bargaining is merged, contains any covenant by the grantee or condition imposed upon her looking to the payment of the indebtedness. In short, the legal effect of the transaction was to convey to Emma B. Thompson the equity of redemption remaining in the estate of the deceased maker of the note. While this might exhaust the estate of Stovin, it did not discharge it. It results in a situation where

the indorsers must assume their secondary liability. It is a fallacy, then, to argue that the maker was released, and hence that they were discharged.

The petition for rehearing is denied.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON concur.

Argued September 9, affirmed September 21, rehearing denied October 19, 1915.

Opinion of September 21, 1915, modified November 16, 1915.

MILLER v. PORTLAND.

(151 Pac. 728.)

Municipal Corporations—Public Improvements—Betterment Assessment—Validity.

1. A contract for a street improvement, giving the superintendent of streets power to increase or diminish its cost, after the contract has been made, by requiring a greater or less amount of material, as he shall determine, renders an assessment invalid.

Municipal Corporations—Public Improvements—Betterment Assessment—Estimation of Work.

2. To the validity of a street betterment assessment, it is not necessary that the preliminary estimate of the cost of making the improvement be precisely accurate, since a reasonable margin for miscalculation must be allowed.

Municipal Corporations—Public Improvements—Betterment Assessment—Exceeding Estimate.

3. Where the expense of completing a street improvement came to \$30,844, instead of \$13,652, as estimated, on account of unforeseen difficulty in foundation work for a retaining wall, such increase in the expenditure was so unreasonable that the assessment of the actual cost of the work was invalid.

From Multnomah: **ROBERT G. MORROW, Judge.**

Department 1. Statement by **MR. CHIEF JUSTICE MOORE.**

This is a suit by Jessie A. Miller and others against the City of Portland, a municipal corporation, to en-

join the enforcement of a lien for a part of the expenses incurred in improving streets. The facts, as far as involved herein, are that the council of the City of Portland adopted a resolution, February 24, 1909, requiring the city engineer to prepare and file with the auditor plans and specifications for the improvement of Hall Street, from the east line of Fourteenth Street westerly to its intersection with Heights Terrace; for the improvement of the latter highway from such crossing to the west line of Sixteenth Street, near College Street; particularly to designate the kind of work to be done, and to make an estimate of the probable cost thereof. This requirement was complied with, and, as the streets proposed to be improved extended along the side of a hill, it was necessary to erect a retaining wall. In referring to such artificial embankment the specifications provided: "The foundation for the wall shall be bedrock or ground satisfactory to the city engineer." Such detailed statement further set forth: "All quantities are more or less." Blue-prints were also filed representing the wall, in one class of the work, as resting on a rock foundation, and in another as supported by earth, as it might be found necessary. The specifications contained a computed quantity of the work supposed to be required in front of each lot, the entire cost of which, including a charge for engineering, advertising and inspecting, was estimated at \$13,652. The improvement was let to contractors for \$12,905.83, but in doing the work it was discovered that a suitable foundation for the retaining wall could not be obtained, except at a much greater depth than had been contemplated, thereby increasing the entire expense of the work to \$30,844. Liens for the proportionate parts of the latter sum were entered against the lots asserted to have been specifically benefited

by the improvement, whereupon a former suit was instituted to prevent the enforcement of such demands, and the decree rendered therein was conditionally affirmed: *Miller v. City of Portland*, 62 Or. 26 (123 Pac. 64). The mandate in that case having gone down, a reassessment of the premises for the entire expense of the improvement was undertaken, to prevent which this suit was brought, resulting in a decree imposing upon the lots of the several plaintiffs, except those that had executed bonds for the payment of their assessments, such a part of the sums so charged as \$13,652, the original estimate of the cost of the improvement, bore to \$30,844, the entire expense thereof, which separate amounts so determined the plaintiffs have been and are ready and willing to pay. From this decree the defendants appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. Walter P. La Roche*, City Attorney, and *Mr. Lyman E. Latourette*, Deputy City Attorney, with an oral argument by *Mr. Latourette*.

For respondents there was a brief over the names of *Mr. A. E. Clark*, *Mr. M. H. Clark* and *Mr. R. F. Peters*, with an oral argument by *Mr. A. E. Clark*.

Opinion by MR. CHIEF JUSTICE MOORE.

The testimony of the city engineer, who had charge of the improvement which was made, is to the effect that beneath the surface, along the line of the proposed retaining wall, shale rock was found, thereby rendering it impossible to ascertain, by drilling or boring into the earth, the depth required for a proper foundation, which could have been determined only by

digging a trench the entire length of the wall. The testimony, however, of the foreman who put up the concrete retaining wall, is in substance that at an expense of not more than \$25 the depth of the foundation could have been established by making holes at different places along the line of the proposed improvement. From the study and experience of an engineer in such matters it must be presumed that his testimony outweighs that of a man who is skilled in the proper use of cement.

The evidence shows that the engineer's estimate of the probable cost of the improvement contained a detailed statement of the kind of work to be performed, specifying, as far as involved herein, the number of cubic yards in each class, and also, as will be remembered, included a clause which reads: "All quantities are more or less." The city, having advertised for bids for making the improvement, received from the firm to whom the contract was awarded a proposal to do the work on the unit basis as to each item specified in the engineer's estimate, a few of which particulars, as set forth in the proposal, will be stated thus: Earth excavation, 2,065 cubic yards, at 75 cents, \$1,548.75; concrete retaining wall, 341.8 cubic yards, at \$11, \$3,759.80; solid rock, 88 cubic yards, at \$4, \$352. These items, together with the others contained in the proposal, aggregated \$12,905.83; that sum being an offer to do the work for \$746.17 less than the estimate. When the work was completed, however, the city engineer certified to the common council that the contractors, in making the improvement according to the plans and specifications, had performed cubic yards of work as follows: Excavation, 4,384; concrete retaining wall, 1,591.5; and solid rock, 254. These items, designed as illustrations of the method pursued, together

with other particulars of the work, made the entire expense of the improvement \$30,844.

1. Based upon this evidence, and assuming as true that the soil contained unseen detached rock, which precluded a predetermination of the required depth of the trench for the retaining wall and the extra cement work thereby necessitated, the question to be considered is whether or not, from an inspection of the clauses in the specifications, "the foundation for the wall shall be bedrock or ground satisfactory to the city engineer," and "all quantities are more or less," the plaintiffs were given such notice of the charges for extra work as to authorize the imposing of burdens upon their real property of more than 125 per cent in excess of the original estimate of the proposed cost, though no objection was made to the improvement until after it was completed.

"A contract for a street improvement which," says a text-writer, "gives to the superintendent of streets the power to increase or diminish the cost of improvement, after the contract has been entered into, by requiring a greater or less amount of material for its completion as he shall determine, renders the assessment invalid": Hamilton, Spec. Assess., § 447.

To the same effect, see, also, Dillon, Mun. Corp. (5 ed.), § 244; *City of Chicago v. Wilder*, 184 Ill. 397 (56 N. E. 395).

This rule is based on the legal principle that an agent cannot delegate his functions to a subagent, unless he is expressly authorized so to do; and as a municipal charter vests in a common council delegated power to determine the kind of improvement to be made, that legislative body cannot legally commit any part of such authority to another officer. Thus in *Bolton v. Gilleran*, 105 Cal. 244 (38 Pac. 881, 45 Am. St. Rep. 33), it was held that a resolution of the board

of supervisors of the city and county of San Francisco, authorizing the construction of sewers according to the plans and specifications prepared by the city engineer, which notice of intention declared that, if the soil were insufficient for a foundation, the earth should be removed to a sufficient depth and planks should be laid, the discretion to determine what planking should be used being left to the superintendent of streets, without any fixed rules to control his judgment, rendered the proceeding void.

In *Perine Contracting etc. Co. v. City of Pasadena*, 116 Cal. 6, 9 (47 Pac. 777, 778), a contract for the improvement of a street was let pursuant to specifications, a clause of which read:

“But the contractor shall put in such extra concrete as the superintendent of streets and the city engineer may require, and in such places and in such form as they may designate. For all such extra concrete the contractor shall be paid at a *pro rata* of contract price for the actual quantity laid.”

With the bid certified checks were deposited, but, contending that the language last quoted rendered the agreement void, the contractor refused to perform the work, and commenced an action to recover the amount of the deposit; the checks having been cashed. It was held that the action would lie; the court saying:

“Here there is left to the superintendent of streets and the city engineer power to increase the cost of work to an indefinite extent. A discretion lodged in the board alone is sought to be devolved upon these officers, and all means are withheld from the property owner of determining what may to him be the ultimate cost of the finished work.”

To the same effect, see, also, *Stansbury v. White*, 121 Cal. 433 (53 Pac. 940); *Chase v. Treasurer of Los Angeles*, 122 Cal. 540 (55 Pac. 414).

The doctrine thus announced was receded from in *McCaleb v. Dreyfus* 156 Cal. 204 (103 Pac. 924), where the specifications for the construction of a sewer provided that:

“If, in the judgment of the city engineer, it shall be necessary to form any portion of the foundation * * of concrete, said concrete shall be paid for as extra work at the price per cubic yard mentioned in the contract.”

It was ruled that the excerpt last referred to did not invalidate the agreement, if the character of the ground where the sewer was to be laid was such that a reasonably accurate estimate of the probable quantity of material required to complete the work could not be made from an inspection of the surface of the earth at that place.

In *State v. Town of Guttenberg*, 38 N. J. Law, 419, the engineer's estimate of the probable cost of improving a street was \$28,038.45. In doing the work, more rock was found in the grade than anticipated, necessitating a deeper excavation in order to secure an earth surface for the roadway, thereby increasing the expense to \$35,854.13, which sum, with interest and incidental expenses, was augmented to \$44,002.41, an increase of 56 per cent over the estimate, and it was held that such excess did not defeat the assessment. In that case no discretion appears to have been given to or vested in any subordinate officer. The assessment and the proceedings subsequent thereto, however, were set aside on the ground of a failure to give notice.

In *State v. Jersey City*, 58 N. J. Law, 144 (35 Atl. 950), a preliminary assessment of \$20,336 was made for the proposed improvement of a street, the actual cost of which was \$24,423.94, of which latter sum

\$7,593.94 was imposed upon the city at large, and the assessment was upheld.

In *Ireland v. City of Rochester*, 51 Barb. (N. Y.) 414, an estimate of \$25,980 was made for a street improvement, the actual cost of which was \$3,319.92 in excess of that sum. In a suit to enjoin the enforcement of the entire demand, it was contended that, under a clause of the charter which provided that no contract should be let for making a public improvement at a price greater than the estimate thereof, no part of such excess could be legally charged against the property benefited; but it was held that the limitation applied only to work included in such calculation, and did not preclude the council from causing other work to be done in addition to that embraced in the estimate, if they found it necessary in order to complete the work undertaken. The judgment was reversed, however, on the ground of a want of notice.

2, 3. From an inspection of the specifications in the case at bar, the plaintiffs undoubtedly could have obtained some information that the cost of making the proposed improvement might possibly exceed the original estimate in a reasonable amount. The purpose to be subserved by requiring an engineer's estimate of the probable expense to be incurred in making a public improvement, the cost of which is to be assessed against the real property expected to be benefited thereby, is to give the owners of the land some reasonable information whereby they may be enabled to act intelligently, and either oppose or favor the proposed undertaking. It is not expected that an accurate estimate of the cost of making such an improvement can be predetermined, and hence a margin must necessarily be allowed in such cases. What excess will be regarded as unreasonable will not be de-

terminated. When, however, the expense incurred in completing the work is more than 125 per cent above the original estimate, it is time to call a halt to such proceedings, even though shale rock is encountered beneath the surface.

The plaintiffs could have had no adequate notice that such a charge could reasonably be expected, and, this being so, the decree should be affirmed; and it is so ordered.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BEAN, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued September 16, dismissed October 5, rehearing denied November 16, 1915.

STATE v. BUTTS.

(151 Pac. 722.)

Appeal and Error—Right to Review—Persons Entitled.

1. Where a proceeding to escheat property has been decided adversely to the state because of the existence of heirs, one who has been made defendant on his own request, and who has unsuccessfully sought to establish a deed to the premises from decedent to himself, but who has joined no issue with the heirs, cannot maintain an appeal, the interest of the state having ceased, and the right of the heirs not having been attacked.

[As to what is escheat and proceedings to perfect it, see note in 29 Am. Dec. 232.]

From Multnomah: **ROBERT G. MORROW, Judge.**

In Banc. Statement by **MR. JUSTICE BEAN.**

This is a special proceeding commenced by the State of Oregon to escheat the property of Henry D. Winters, deceased. The information alleges that Henry D. Winters in his lifetime was the last person lawfully seized of the real property described there-

in, and left no heirs or known kindred capable of inheriting his property and estate, and that the same had escheated and vested in the State of Oregon. On May 15, 1913, an order was made requiring all persons in the name of the State of Oregon, interested in the estate of Henry D. Winters, deceased, to appear and show cause, if any they had, why title to said real and personal property should not be adjudged in the State of Oregon, and further requiring such order to be published as required by statute. On April 29, 1913, Will E. Purdy, the appellant herein, served upon counsel for the state a notice and motion based upon affidavits requesting to be made a party defendant in said suit. An order was made making Purdy a party defendant, whereupon he answered, denying that the property described in a certain deed from Winters to him was owned by H. D. Winters at the time of his death, and alleging that he (Purdy) was the owner in fee simple of the property, and that the state had no right therein. A reply was filed by the state denying the allegations therein and setting forth as an affirmative defense, and by way of estoppel, the decree of the Circuit Court of the State of Oregon for Multnomah County in the case of *Agnes Butts, Administratrix of the Estate of Henry D. Winters, Deceased, v. Will E. Purdy*, affirmed by the Supreme Court, 63 Or. 150 (125 Pac. 313, 127 Pac. 25), wherein it was adjudged that the alleged deed from Winters to Purdy was fraudulent and void. The reply also alleged that the claim of defendant Will E. Purdy to the real estate was fabricated, fraudulent and without consideration.

Eight sets or groups of persons claiming to be the heirs of Henry D. Winters, deceased, were upon their application made defendants. Each set filed separate answers setting up their alleged heirships, and that

by virtue thereof they were entitled to the estate heretofore mentioned. No replies were filed by any of the different defendants raising any issues between themselves. November 20, 1914, defendant Purdy filed a motion for a separate trial of the issues between the State of Oregon and himself on the ground that the question to be decided as between the plaintiff and himself was separate and distinct from that to be decided between the plaintiff and the remaining defendants. The motion was overruled by the court, but when the case came on for trial before a jury, the court made an order that the issues between the plaintiff and the defendant Will E. Purdy should be first tried and determined. A jury was selected, and the issues between the state and Purdy were tried, and a verdict rendered in favor of the plaintiff state. This jury was then discharged by the court, another selected, and the cause tried as between the State of Oregon and the several persons claiming to be heirs of Henry D. Winters, deceased. A verdict was rendered in favor of certain groups of heirs and against several other claimants. Judgment was first entered separately on the verdict against Purdy. Afterward the court vacated the entry and entered judgment upon the several verdicts. The journal entry of the judgment in the Circuit Court recites the verdict found by the jury in favor of the state and against defendant W. E. Purdy, and that the several sets of defendant heirs introduced evidence on behalf of their claims separately; that the jury rendered a verdict in favor of a large number of the claimants as the heirs of Henry D. Winters, deceased, and against several of the claimants. Based upon the verdict rendered upon the trial between the state and defendant Will E. Purdy, it was adjudged that said defend-

ant had no right, title or interest in or to any of the property involved in the action. It was further adjudged that the real property of the decedent had not escheated to the state, and that several of the defendants be declared heirs of the above-named decedent, and certain other claimants not heirs of said Henry D. Winters, deceased. No issue was raised and no trial had between Purdy and any of the other defendants. From this judgment Will E. Purdy appeals as against the state and all the defendants who were declared to be heirs of Henry D. Winters, deceased.

DISMISSED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Albert H. Tanner*.

For respondent, State of Oregon, there was a brief over the names of *Mr. Walter H. Evans*, District Attorney, *Mr. John F. Logan* and *Mr. R. Citron*, with an oral argument by *Mr. Walter H. Evans*.

For respondent, Agnes Butts, there was a brief and an oral argument by *Mr. Cicero M. Idleman*.

For respondents, John Buckley et al., there was a brief over the names of *Messrs. Gance & Ohmart*, *Messrs. Hall & Lepper*, *Messrs. Clark & Clark* and *Mr. Samuel Grffin*, with oral arguments by *Mr. H. L. Gance* and *Mr. Ansel R. Clark*.

MR. JUSTICE BEAN delivered the opinion of the court.

This proceeding was commenced prior to the amendment of the statute relating to escheats: Gen. Laws Or. 1915, p. 248. The provisions of the statute before the amendment, so far as deemed necessary to mention, were as follows:

“When any person shall die intestate without heirs, leaving any real, personal, or mixed property, interest, or estate, in this state, the same shall escheat to and become the property of this state”: Section 7363, L. O. L.

The state may maintain any action, suit or proceeding necessary to recover the possession of any such property or for the enforcement or protection of its rights on account thereof in like manner and with like effect as any natural person. The proceedings shall be prosecuted by the district attorney under the direction of the Governor: Section 7364, L. O. L. The statute directs that such escheated property shall be subject to the lawful claims of creditors, and provides for the foreclosure of any lien thereon: Section 7365, L. O. L. It enacts that at any time after the death of such person, and whenever the Governor believes that any such property has escheated to the state, he shall direct the proper district attorney to file information in behalf of the State of Oregon in the Circuit Court of the county in which the estate or any part thereof is situated, setting forth the description of the same, the name of the person last seised, the name of the occupant or the person in possession and claiming the same, if known, and the fact that such person last seised has died without heirs, leaving the property so described in the information escheated and vested in the state. It directs that the court upon application make an order setting forth briefly the contents of the information and requiring all persons interested in the estate to appear and show cause, if any they have, why the title should not vest in the state, which order must be published for at least six successive weeks. Exclusive jurisdiction for the purpose of declaring an escheat

is vested in the Circuit Courts of the state subject to appeal to the Supreme Court: Section 7366, L. O. L.

“All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, the title of the state to lands, tenements, and other property therein mentioned, at any time before the time for answering expires; and any person claiming an interest in such estate may appear and be made a defendant by motion for that purpose in open court, within the time allowed for answering as fixed in the said published order; and if no person appears and answers within the time, then judgment must be rendered that the state be seised of the lands and tenements or property in such information claimed; but if any person appears and denies the title set up by the state, or traverses any material facts set forth in the information, the issue of the fact must be tried, as issues of facts are tried in civil actions, with the aid of a jury, if requested by either party. If, upon such trial, the verdict of the jury, if there is a jury, or the judgment of the court, if the case is tried by the court without a jury, be in favor of the state, judgment must be rendered that the state be seised thereof and recover costs of suit against the defendant”: Section 7369, L. O. L.

When real property is adjudged escheated to the state, a sale as upon execution is ordered, and, if confirmed, the net proceeds are directed to be paid to the state treasurer: Section 7370, L. O. L. Within ten years after judgment in any such proceeding had under the statute, a person not a party or privy to such proceeding may file a petition in the Circuit Court showing his claim or right to the property escheated or the proceeds thereof. Service is required to be made upon the district attorney, who must answer. If upon a trial it is determined that such person is entitled to the proceeds thereof, the court must order the same delivered to him subject to the costs and expenses

of the state and the expenses of administration, and all claims of creditors of deceased: Section 7374, L. O. L.

The statutes of the various states differ somewhat in regard to escheat proceedings. They are, in effect, the same as what was known at common law as an inquest of office, or inquisition, to determine whether decedent left any heirs: *Hamilton v. Brown*, 161 U. S. 256 (40 L. Ed. 691, 16 Sup. Ct. Rep. 585); 2 Cooley's Blackstone (3 ed.), p. 258.

At the threshold of this case the important question arises as to the effect of a review of the proceedings upon the trial in the court below. The efficacy of the adjudication of the claim made by the defendant Will E. Purdy as against the plaintiff, State of Oregon, at the time Purdy was made a party defendant depended solely upon the condition that it should be found that the property of Henry D. Winters had escheated to the state; that is, that the decedent had died intestate, without leaving any heirs. When it was determined that certain named persons were the legal heirs of the decedent, the state had no further interest in the controversy. The continuation of proceedings in the name of the state in order to settle any questions of title between other claimants would be improper. In *State v. Engle*, 21 N. J. Law, 347, it was held that after the state in escheat proceedings had acknowledged a certain person as heir at law and released its right to such heir, the court would not permit such heir to proceed with the escheat proceedings in the name of the state for his own benefit to litigate a question between him and a third person claiming independently of the state.

In the case at bar the State of Oregon is making no further claim to the property of Henry D. Winters,

deceased. An examination of the case with a view of remanding the cause for a new trial as against the state would be ineffective. As to the other defendants who were declared to be heirs of Henry D. Winters, deceased, there are no issues of fact between them and Purdy to be tried. There was no attempt to try any such issue in the Circuit Court. As to such defendants, therefore, there is no case to be remanded in any event. The defendant Purdy was not named in the information filed. He appeared voluntarily, and at his own request had a separate trial as between himself and the state. He is responsible for being a party to the cause, and as to the force or effect of such a judgment he has no reason to complain.

In order to authorize the Supreme Court to consider an appeal, there must be real present questions involving actual interests and rights of the parties. When an appeal involves only a moot question of law or fact, the appeal should be dismissed: *State v. Brown*, 5 Or. 119; *Chicago, R. I. & P. Ry. Co. v. Dey*, 76 Iowa, 278 (41 N. W. 17); *Moller v. Gottsch*, 107 Iowa, 238 (77 N. W. 859); *Doidge v. Bruce* (Iowa), 116 N. W. 726.

In the proceedings in the Circuit Court the real purpose of the defendant Purdy appears to have been to obtain a new trial of the issues in the case of *Butts v. Purdy*, 63 Or. 150 (125 Pac. 313, 127 Pac. 25), which have been heretofore carefully and thoroughly considered and adjudicated.

It follows that this appeal should be dismissed, and it is so ordered. DISMISSED. REHEARING DENIED.

MR. JUSTICE MCBRIDE did not sit.

MR. JUSTICE BURNETT concurs in the result.

Argued September 16, affirmed October 5, rehearing denied November 16, 1915.

WOOD v. WOOD.*

(151 Pac. 969.)

Trademarks and Trade Names—Right to Use Own Name.

1. While a natural person has an unqualified right to the use of his family name in conducting any business, though such use be detrimental to other individuals of the same name, he cannot combine his name with others for the purpose of working a fraud.

Trademarks and Trade Names—Unfair Competition—What Constitutes—"Realty"—"Company."

2. Plaintiffs formed the Wood Realty Company, a firm engaged in the real estate business. Defendant, who had no associate, started business under the name of the W. E. Wood Realty Company. There was some confusion of mails and business, some persons mistaking defendant for plaintiff. *Held*, that the word "realty," which is used as a collective noun for real estate and when used in a firm title indicates brokers engaged in the purchase and sale of real estate, and as the word "company" indicates an associate or partnership, defendant will be restrained from continuing business under such title; the use of his name constituting unfair competition.

Trademarks and Trade Names—Suits to Enjoin.

3. In a suit to enjoin the infringement of a trade name, it is not necessary to prove there was a fraudulent intent to deceive.

[As to what words may constitute valid trade names, see note in 85 Am. St. Rep. 83.]

From Lane: LAWRENCE T. HARRIS, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit to enjoin the use of a trade name. The facts are that the plaintiff H. H. Wood and a Mr. Galey were partners and engaged at Eugene, Oregon, as land brokers under the firm name of the "Galey-Wood Realty Company" until October, 1912, when Galey retired and the plaintiff Harvey Wood succeeded him, whereupon the firm was reorganized

*As to limitation of right to use one's own name as trade name, see notes in 1 L. E. A. (N. S.) 660; 28 L. E. A. (N. S.) 934.

On relief against infringement of trade name not used in connection with manufactured article, see note in 15 L. E. A. (N. S.) 625.

and continued the business at the same place as the "Wood Realty Company." The defendant W. E. Wood alone began business in the same city in May, 1913, as the "W. E. Wood Realty Company." The plaintiffs on December 26, 1913, duly filed a certificate of their assumed business name as required by statute: Gen. Laws Or. 1913, c. 154. The cause being at issue was tried, resulting in a decree as prayed for in the complaint, and the defendant appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. S. D. Allen*.

For respondents there was a brief over the name of *Messrs. Jones & Burton*, with an oral argument by *Mr. S. N. Burton*.

Opinion by MR. CHIEF JUSTICE MOORE.

It is contended that the defendant was entitled to the use of his family name, and the word "realty," when applied to the business in which he was engaged, was a term of description, and, such being the case, an error was committed in granting the relief awarded. Though there is a well recognized distinction between a trademark and a trade name, these classifications are usually treated in text-books under the title of the former designation, and legal restraint is granted or denied upon a consideration of the question whether or not the similarity in the appellation is such as to constitute unfair competition: *Hopkins, Unfair Trade*, § 52. This author, in referring to that subject, observes:

"In using the expression 'trade name,' however, it must be remembered that it is simply a colloquial

term, used by the courts as a matter of convenience, and that it has no technical significance.”

Reasonable rivalry in the pursuit of any trade or occupation usually promotes the public welfare by preventing a monopoly. It is only when the persons engaging in a contest, to secure business or to obtain employment, adopt similar trade names or select like designs as trademarks, and thus are enabled to appropriate a competitor's traffic or the fruits of his vocation whereby such conduct tends to deceive the public, that equity will intervene.

1-3. The rule generally obtains that a natural person has an unqualified right to the use of his family name in conducting any business, though such use may be detrimental to other individuals of the same name, or to corporations in the titles of which such name forms the whole or an integral part: *Russia Cement Co. v. Le Page*, 147 Mass. 206 (17 N. E. 304, 9 Am. St. Rep. 685). See, also, the valuable notes to *International Silver Co. v. William H. Rogers Corp.*, 2 Ann. Cas. 407, 415; *Martell v. St. Francis Hotel Co.*, 16 Ann. Cas. 593, 596.

“The name of an individual,” says a text-writer, “does not constitute a valid technical trademark because, as between persons of the same or similar names, each has an equal right to use his own name in his own business, and trademarks, being property rights, are necessarily exclusive. Everyone, however, is entitled to protection against unfair competition, and no one is entitled so to use even his own name as to pass off his goods or business as the goods or business of another, thereby robbing the latter of the benefits of his goodwill and reputation and working a fraud upon the public”: 28 Am. & Eng. Ency. Law (2 ed.), 384.

To the same effect, see, also, 38 Cyc. 724; Hopkins, Unfair Trade, § 51.

In *Martin Co. v. Martin & Wilckes Co.*, 75 N. J. Eq. 39, 50 (71 Atl. 409, 414), in discussing this subject Mr. Vice-Chancellor STEVENSON remarks:

“I think we have got beyond the notion, if it ever prevailed, that a man has an absolute right to use his name in his business shutting his eyes to the inevitable effect of such use to deceive the public generally, and to injure some other dealer in the market. The maxim, ‘*Sic utere tuo ut alienum non laedas*,’ applies to everything that a man has, including his name.”

In a note to the case of *Martell v. St. Francis Hotel Co.*, 16 Ann. Cas. 593, 596, it is said:

“Where a personal name has become identified with certain goods or a certain business, it is incumbent upon a person with a similar name, subsequently engaging in the same business or dealing in the same kind of goods, to take such affirmative steps as may be necessary to prevent confusion.”

It will be assumed, without deciding the question, since a determination thereof is unnecessary on account of the conclusion reached on the other inquiry, that the defendant's initials, “W. E.,” prefixed to a part of his assumed name, evidence an affirmative act designed to prevent confusion with the plaintiff's trade name in this particular. See, however, the case of *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220, in which it was held that, where by long use the words “Baker's Chocolate” had come to mean in the minds of the public the plaintiff's goods, a subsequent maker of chocolate with the same name was not entitled to use that name, whether with his given name or its initials, in such manner as to announce that the goods he sold were “Baker's Chocolate.”

The plaintiff H. H. Wood, referring to the defendant, testified as follows:

"Directly after I heard that he was engaged in that business under that name, I remonstrated with him, and I asked him to desist, that we would have a confusion of business, we were doing business under that name, and he said that he had his stationery out, and I asked him if he couldn't cancel the stationery and do away with it in some way, and he declined to do that. Finally he told me—well, I spoke to him about it afterward, whether at that time or at the time afterward I spoke to him about it, and he says he thought he had a perfect right to use his own name in his own business. I told him he had no right whatever to use our firm name. I says, 'Who is your company? Have you a partner?' 'No,' he says, 'but I expect to have.' I says, 'If you haven't a partner, you are not a company.'"

In *Fuller v. Huff*, 104 Fed. 141, 143 (51 L. R. A. 332, 334, 335, 43 C. C. A. 453, 455), in speaking of a generic term used in a trademark, the court says:

"The term 'health food' means healthy food, or health-producing food, and is therefore descriptive of quality, and cannot be a technical trademark, either with or without the word 'company,' any more than the word 'nutritious wine' could be a valid trademark. If a case against the defendant exists, it is one of unfair competition; and the law upon the subject of the adoption by a competitor of names or words descriptive of quality, which have previously become trade names, and which adoption will constitute unfair competition, is correctly stated by the counsel for the defendant as follows: 'When such a mark, name or phrase has been so used by a person in connection with his business or articles of merchandise as to become identified therewith, and indicate to the public that such articles emanate from him, the law will prohibit others from so using it as to lead purchasers to believe that the articles they sell are his or as to

obtain the benefit of the market he has built up thereunder."

"The same statement of the law is contained in the case of *Reddaway v. Bunham*, [1896] App. Cas. 199, decided by the House of Lords in 1896, in which it was held that one person was not entitled to pass off his goods as those of another by selling them under a name likely to deceive purchasers, whether immediate or ultimate, into the belief that they were buying the goods of the former, although the name was, in its primary sense, merely a true description of the goods. The subject of the unlawful use by competitors of the name under which a rival has previously presented himself to the public and has gained a business reputation, although the name is not strictly a trademark, and is either geographical or descriptive of quality, has been frequently of late before the courts, which have demanded a high order of commercial integrity, and have frowned upon all filching attempts to obtain the reputation of another."

Further in the opinion it is observed:

"Although the intent of the defendant's principal when it commenced to use the name 'Health Food' may have been innocent, the continuance, after it had learned of the complainant's prior use, indicates its deliberate intention to use the name without reference to the complainant's possible prior rights."

A lexicographer defines the word "realty" thus:

"A term sometimes used as a collective noun for real property or estate—more generally to imply that that of which it is spoken is of the nature or character of real property or estate": *Bouvier's Law Dictionary* (Rawle's 3 ed.).

The term "realty," as used by the defendant, when employed to qualify the word "company," evidently means an offer on his part to negotiate for others the purchase and sale of land, the obtaining of loans of money to be secured by real property, etc. The ex-

pression "realty," as thus applied is descriptive of a class of business in which the parties hereto are engaged. Such term, therefore, cannot be a part of a technical trade name, but its use, in the same locality, subsequent to the plaintiffs' adoption of the word, tends to constitute unfair competition in that, as the testimony discloses, owners of real property have been led to believe that the term related to the plaintiff's assumed name and by this means the defendant may have been and, unless restrained, will be enabled to obtain the benefit of the goodwill which his rivals have built up.

It will be remembered that the defendant, having no partner in the real estate business, adopted as a part of his trade name the word "company," which indicates that he had formed, with other individuals, an association or partnership: *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 602 (32 L. Ed. 535, 9 Sup. Ct. Rep. 166). The employment by the defendant of the word "company," when there was no other member, evidences a purpose to simulate the plaintiffs' assumed name, and particularly so when, after the defendant was notified of the prior legal adoption of such word as a part of his rivals' trade name, he persisted in taking advantage of the term, thereby indicating a deliberate intention to continue such use without reference to the plaintiffs' right: *Hygeia Distilled Water Co. v. Consolidated Ice Co.* (C. C.), 144 Fed. 139; *Regis v. H. A. Jaynes & Co.*, 185 Mass. 458 (70 N. E. 480). But, however this may be, it has been held that, in a suit to enjoin the infringement of a trade name, it is not necessary to prove that there was a fraudulent intention to deceive: *Viano v. Baccigalupo*, 183 Mass.

160 (67 N. E. 641); *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42 (45 L. Ed. 77, 21 Sup. Ct. Rep. 16).

It appears from the testimony that several persons wrote to the defendant upon matters pertaining to real estate dealings when they supposed they were addressing their communication to the plaintiffs, and that by the use of the name referred to the public was deceived, thereby substantiating the fact of unfair competition.

It follows from these considerations that the decree should be affirmed, and it is so ordered.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BEAN, MR. JUSTICE EAKIN and MR. JUSTICE MCBRIDE concur.

Argued September 24, affirmed October 13, rehearing denied November 16, 1915.

STATE EX REL. v. SCHOOL DISTRICT No. 3.

(152 Pac. 221.)

Schools and School Districts—Dissolution of Districts—Constitutional and Statutory Provisions.

1. Session Laws of 1915, page 54, Section 2, providing for the dissolution of union high school districts by a vote of the voters of the districts forming the union school district and prescribing the procedure to be followed, does not violate Article XI, Section 2 of the Constitution, providing that the legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town, and that the legal voters of every city and town are thereby granted power to enact and amend their municipal charter, since this provision does not extend to school districts which have no charters, but depend for their existence upon the general laws of the state.

Constitutional Law—Legislative Powers.

2. The legislature is invested with legislative power to the fullest extent except so far as limited expressly or by necessary implication in the state and federal Constitutions, and in considering the constitutionality of an act the question is not as to the extent of the power delegated by the people to the legislative assembly, but as to the extent of the limitations the people have imposed upon that body.

[As to when statute is to be declared void as conflicting with the Constitution, see note in 48 Am. Dec. 269.]

Schools and School Districts—Dissolution of Districts—Constitutional and Statutory Provisions.

3. There is nothing in the Constitution prohibiting the legislature from passing a general law providing the manner whereby a *quasi* municipality, such as a school district, may be dissolved.

Schools and School Districts—Dissolution of Districts.

4. A *quasi* municipality, such as a school district, can be dissolved only in the manner prescribed by law, and its inhabitants are powerless to dissolve it, unless this be done as the law directs.

Schools and School Districts—Dissolution of Districts—Constitutional and Statutory Provisions.

5. Laws of 1915, page 54, Section 2, relative to the dissolution of union high school districts, does not violate Article IV, Section 1a of the Constitution, providing that the initiative and referendum powers are thereby reserved to the legal voters of every municipality and district as to all local, special and municipal legislation, and that the manner of exercising such powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising such powers as to their municipal legislation, since it is in accordance with the spirit of this provision for the legislature to provide the method by which a school district or other *quasi* municipal corporation may vote upon a matter of purely local concern.

Schools and School Districts—Dissolution of Districts—Constitutional and Statutory Provisions.

6. Laws of 1915, Chapter 40, Section 2, relative to the dissolution of union high school districts, is not repealed by Laws of 1915, Chapter 211, providing a method whereby an incorporated city, town or municipal corporation may surrender its charter and disincorporate, as this does not relate to the same matters as Chapter 40, and does not displace it or conflict with it.

From Clatsop: JAMES A. EAKIN, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit in the name of the State of Oregon, upon the relation of B. W. Otto, against School District No. 3 of Clatsop County, Oregon. The facts are as follows:

In 1915 the legislature of the State of Oregon passed an act providing for the dissolution of union high school districts: Laws 1915, pp. 52-55. In August of the same year the regular electors of school districts Nos. 3, 10, 15, 36 and 37, comprising Union High School District No. 1 of Clatsop County, filed with the dis-

trict boundary board their written petitions, asking for the holding of a special election on September 9th, in order to vote on the question of whether or not Union High School District No. 1 should be dissolved. The district boundary board of Clatsop County thereupon gave the various districts notice, as required by law, fixing September 9, 1915, as the day of this special election. The regularity of these various proceedings is not questioned upon this appeal. Plaintiff instituted this suit to restrain the district officers and the district boundary board of Clatsop County from considering or carrying into effect the result of such election. The Circuit Court sustained a demurrer to plaintiff's complaint and dismissed the suit. Plaintiff brings this appeal.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. C. W. Mullins*, District Attorney, and *Messrs. Norblad & Hesse*, with an oral argument by *Mr. A. W. Norblad*.

For respondents there was a brief over the names of *Mr. George C. Fulton* and *Mr. A. C. Fulton*, with an oral argument by *Mr. George C. Fulton*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. Plaintiff claims that the act under which the election was held is unconstitutional, for the reason that the power to repeal charters of municipal corporations, either by special or general laws, has been withdrawn from the legislature by the amendment to Section 2 of Article XI of the Constitution, which provides:

“The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any mu-

municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

Plaintiff further claims that the legal voters of municipalities have no power to repeal their municipal charters by vote, as such power rests exclusively in the entire electorate of the state. Defendant expressly waives all questions as to procedure, and submits that the Constitution does not require that the question of the dissolution of a union high school district, road district, or the like, be submitted to the electors of the whole state, but that the legal voters of a district may dissolve a union high school by proceeding in accordance with the general statute mentioned. The act for consideration is an amendment to Section 4194, L. O. L. Section 1 provides for the organization of a union high school district by uniting contiguous school districts for high school purposes upon a prescribed petition therefor to the district boundary board, and the submission to the legal voters of the school districts or parts of districts proposed to be consolidated, if a majority of all votes cast on the subject is in favor of uniting such school districts for high school purposes, provided, however, that the majority of all votes cast in a majority of the districts shall be in favor of the proposition. That part of Section 2 of the act deemed necessary to mention directs:

"Whenever it is desired to dissolve a union high school district that has been regularly formed, a petition from the majority of the districts within the union district shall be presented to the district boundary board requesting said boundary board to direct the school board of each district in said union high school district to state in the notice for the next annual or special meeting or election that

the question of dissolving said union high school district will be submitted. The petitions shall contain at least 10 per cent of the legal school voters in the districts petitioning. Within ten days after receiving such petitions the district boundary board shall direct, in writing, the respective school boards of the districts comprising said union high school district to give the notice as requested in said petitions. The vote on the question must be by ballot, and the ballot shall have written or printed thereon the words: 'For Dissolution of Union High School District No.—Yes.' 'For Dissolution of Union High School District No.—No.' "

The manner of holding the election, making and canvassing the returns, and declaring the result, is then prescribed. It will be noticed that pursuant to the direction of the legislative enactment the different school districts act as a unit both in the organization and dissolution of a union high school district. The matter is treated as a local one. Prior to the amendment of the Constitution, school districts were not granted charters by the legislature, and since they have not enacted, amended or repealed their charters. Strictly speaking, they have no charters. They depend for their existence and guidance upon the general laws of the state: *School Dist. v. Holden*, *post*, p. 267 (151 Pac. 702). The constitutional amendment, relieving the legislature of the burden of granting charters to municipalities or changing or amending such instruments, did not extend to school districts nor affect them.

2-4. The legislature of this state is invested with legislative power to the fullest extent, except so far as limited expressly or by necessary implication in the Constitution of the state and of the United States, and in considering the constitutionality of an act of the legislature, the question is not as to the extent of

the power that has been delegated by the people to the legislative assembly, but as to the extent of the limitations the people have imposed upon such body: *David v. Portland Water Committee*, 14 Or. 109, 110 (12 Pac. 174). Nothing in Chapter 40, 1915 Session Laws of Oregon, can be construed to be an attempt by the legislature to dissolve any corporation or to repeal any charter thereof. The act in question simply provides a method whereby the people of a union high school district may dissolve such district. There is nothing in the Constitution of the State of Oregon prohibiting the legislature from passing a general law providing the manner whereby a *quasi* municipality may be dissolved. It can be dissolved only in the manner prescribed by law, and its inhabitants are powerless to dissolve it unless this be done as the law directs: *McKeon v. Portland*, 61 Or. 385 (122 Pac. 291); 1 McQuillin, Mun. Corp., § 301; 1 Dillon, Mun. Corp., §§ 172, 173; *School Dist. v. Palmer*, 41 Or. 485 (69 Pac. 453).

5. As to whether or not the statute is in harmony with the provisions for home rule, let us consider that part of Section 1a of Article IV of the Constitution adopted in 1906, which is as follows:

“The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than 10 per cent of the legal voters may be required to order the referendum nor more than 15 per cent to propose any measure, by the initiative, in any city or town.”

It is in accordance with the spirit of the latter amendment for the legislature to provide the method by which a school district or other *quasi* municipal corporation may vote upon a matter which is of purely local concern: *Acme Dairy Co. v. Astoria*, 49 Or. 520 (90 Pac. 153); *McBee v. Springfield*, 58 Or. 459 (114 Pac. 637); *Schubel v. Olcott*, 60 Or. 503 (120 Pac. 375); *State ex rel. v. Portland*, 65 Or. 273 (133 Pac. 62); *State ex rel. v. Gilbert*, 66 Or. 434 (134 Pac. 1038). This holding is in accord with the opinion in *Branch v. Albee*, 71 Or. 188 (142 Pac. 598), and other cases cited and relied upon by plaintiff. It is appropriate and in the interest of higher education that school districts be provided with efficient legal machinery for ascertaining and carrying into effect the will of the people directly interested in the affairs of a particular locality, or union high school district. We conclude that the act in question is not repugnant to the Constitution.

6. It is suggested by counsel for plaintiff that if the statute referred to is constitutional, then it was repealed by a later act of the same session of the legislature (Chapter 211, Laws 1915, p. 273), providing a method whereby an incorporated city, town or municipal corporation may surrender its charter and disincorporate. This enactment does not relate to the same matters as the statute under consideration, and does not displace the same, conflict therewith or repeal the act in question.

It follows that the decree of the lower court should be affirmed, and it is so ordered.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE
and MR. JUSTICE HARRIS concur.

Argued October 14, affirmed October 22, rehearing denied November 16, 1915.

PORTLAND v. NEW ENGLAND CASUALTY CO.*

(152 Pac. 253.)

Municipal Corporations — Public Work — Contractor's Bond—Beneficiaries.

1. Construing liberally, as it should be, Laws of 1903, page 256, Section 6266, L. O. L., entitled "An act to protect subcontractors, materialmen, and laborers furnishing material for doing work upon * * public works," and requiring every original contractor for public work to execute a bond to pay "all persons supplying him * * labor or materials * * for the work, and providing that anyone applying for a copy of the bond, and making affidavit "that labor or materials for the prosecution of such work has been supplied by him," and not paid for, shall be furnished with a copy, and "said person * * supplying such labor or materials shall have a right of action" on the bond, inures to the benefit of one hauling materials under contract with a subcontractor.

From Multnomah: JOHN B. KAVANAUGH, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action brought by the City of Portland, for the use and benefit of W. W. Swan, against the New England Casualty Company, a corporation, the Oregon Hassam Paving Company, a corporation, and others, to recover the sum of \$78.75 upon a bond executed by virtue of the terms of Section 6266, L. O. L. (Laws 1903, p. 256). That section requires that all persons firms or corporations entering into a contract with the State of Oregon or any municipality, county or school district within the state, for the construction of any public buildings, or the prosecution and completion of any work shall execute the usual penal bond, with the additional obligation:

"That such contractor or contractors shall promptly make payments to all persons supplying him or them

*As to liability on contractor's bond for labor or material employed in the work but not by order of the principal, see note in 43 L. R. A. (N. S.) 66. REPORTER.

labor or materials for any prosecution of the work provided for in such contracts.”

The law of 1903 was amended by the act of February 3, 1913 (Laws 1913, p. 59). The amendment did not change the liability of the principal or surety upon the bond, but merely added a provision that in the event of the failure of the proper officers to require the bond thus directed, the state, municipality, county or school district, as the case may be, and the officers authorizing such contract, shall be jointly liable for such labor and materials.

On October 30, 1912, the defendant Oregon Hassam Paving Company stipulated with the City of Portland for the improvement of East Sixtieth Street from the south line of Division Street to the south line of Hawthorne Avenue extended easterly, pursuant to the charter and ordinances of the city. According to the plans and specifications described in the contract, the Oregon Hassam Paving Company was to furnish all the material and perform all the labor necessary in the prosecution of the work. This company, hereinafter referred to as the contractor, entered into a subcontract with Miller & Bauer to lay certain cement sidewalks called for in the original contract. This latter firm engaged R. J. Rowen and Harry Ewing, partners doing business as the Auto Truck Company, to haul cement from certain warehouses in the city to the place of improvement for use in the construction of the sidewalks. The truck company, in turn, hired the relator, W. W. Swan, to do this hauling in auto trucks owned and operated by him. Neither the contractor nor Miller & Bauer had any direct dealing with Swan. It appears from the findings of fact that the Auto Truck Company was paid in full by Miller & Bauer for the material

hauled to the work, but that the former failed to pay Swan. The contractor executed and delivered to the City of Portland a penal bond in statutory form, with the defendant New England Casualty Company as surety thereon, dated October 30, 1912, for the sum of \$20,316.28, conditioned that the contractor would pay all claims for labor, work and material on account of all subcontractors, materialmen and laborers employed under said contract as required by Section 162 of the charter of the City of Portland and the laws of the State of Oregon. The obligation contained the following provision:

“It being understood that any laborer, materialman, or subcontractor whose just claims may not be satisfied shall have and is hereby granted a right of action upon this bond in the name of the City of Portland, and said action shall have the same force and effect as if said city was enforcing the covenants of this bond as provided in Section 162 of the charter of said City of Portland.”

The labor of Swan in hauling material to the work was essential in the prosecution of the improvement, and was furnished to the original contractor to enable him to fulfill his agreement with the city.

The action is based upon the failure of the Auto Truck Company to pay its employee, Swan, the relator herein, and upon his allegation that he is one of the parties for whose benefit the bond was required. The facts of the case were stipulated by the respective counsel, and the trial court made findings substantially as above stated. Judgment was thereupon rendered in favor of plaintiff. The defendants New England Casualty Company and the Oregon Hassam Paving Company prosecute this appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. Robert J. O'Neil*, *Mr. John K. Kollock* and *Messrs. Zollinger & McDowall*, with oral arguments by *Mr. O'Neil* and *Mr. Kollock*.

For respondent there was a brief over the name of *Messrs. Lewis & Lewis*, with an oral argument by *Mr. Arthur H. Lewis*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. While the amount in issue is not large, there are other cases depending upon the result. The matter to be considered is important as well to contractors and surety companies as to laborers and materialmen. The form of the question presented is whether or not the findings support the judgment. The rights of the plaintiffs and the defendants are measured in accordance with the statutory bond required. In the execution of such an instrument the parties thereto are presumed to have had notice of and taken into consideration and understood the statute authorizing the same. The provisions of the act are practically made a part of the bond, just as though they were incorporated therein: *State v. Manhattan Rubber Co.*, 149 Mo. 181 (50 S. W. 321); *Board v. United States Fidelity & Guaranty Co.*, 155 Mo. App. 109 (134 S. W. 18-20). It is not incumbent upon us to notice the exact phraseology of the bond, because it was stated at the argument and it appears in the briefs that the writing was executed according to the statute. The rights of the parties depend upon the construction to be given to the legislative enactment in question. The title of the law reads thus:

“An act to protect subcontractors, materialmen, and laborers furnishing material for doing work upon pub-

lic buildings, structures, superstructures, or other public works.”

The act provides as follows:

“Hereafter any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or school district within said state, for the construction of any buildings, or the prosecution and completion of any work, or for repairs upon any building or work, shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts; and any person or persons making application therefor, and furnishing affidavit to the proper officer of such state, county, municipality, or school district, under the direction of whom said work is being or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for the same has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor or materials shall have a right of action, and shall be authorized to bring suit in the name of the State of Oregon, or any county, municipality or school district within such state for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution.”

It is contended by the defendants that hauling material does not bring the claimant within the terms of the statute so as to give him right of action for labor performed or materials furnished, unless he was directly employed by the contractor. The law in question is substantially a copy of Act Cong. Aug. 13, 1894, c. 280, 28 Stats. at Large, p. 278 (6 Fed. Stats. Ann.

125; Comp. Stats. 1913, § 6923). In ascertaining the meaning intended by similar statutes the courts often look to the section or clause providing who shall have a right of action to see what he must show to obtain such right. When we examine this feature of our enactment we find that it requires any person or persons making application to the designated officers for a copy of the bond to furnish an affidavit "that labor or materials for the prosecution of such work has been supplied by him or them," and that payment thereof has not been made. The law then directs that he or they shall be furnished with a copy of the contract or bond, and ordains that "said person or persons supplying such labor or materials shall have a right of action" upon the bond. The act contains no requirement for a showing to be made that the labor or material has been supplied pursuant to a contract with the original contractor or anyone. It does not limit the right of recovery to those who furnish labor or materials directly to the contractor, but all who supply him with labor or material for any prosecution of the work provided for in the contract are to be protected. The language of the title and the act plainly indicate that it was the intention of the lawmakers to protect those whose labor or material has been furnished in the accomplishment of the work. The amendment of 1913, while not controlling, furthers the same intent. The bond should be construed with a view of determining the fair scope and meaning of the contract in the light of the language employed and the circumstances surrounding the parties: *Ulster County Savings Inst. v. Young*, 161 N. Y. 23 (55 N. E. 483). In order to effectuate the purpose of the law, it should receive a liberal construction. The rule often applied to me-

chanic's lien statutes does not govern: *National Surety Co. v. Lumber Co.*, 67 Wash. 601 (122 Pac. 340).

In order to free himself from liability on the bond for material or labor furnished, the act, in effect, imposes upon a contractor the duty of seeing that the persons who furnish the material and perform the labor in the furtherance of the contract are paid. This would not seem to work any hardship upon the contractor or his surety, for, if he does not care to ascertain who actually supplies the labor and materials, he can require that the subcontractor indemnify him with proper security.

The ruling in *Ulster Co. Savings. Inst. v. Young*, 161 N. Y. 23 (55 N. E. 483), is in conformity with the spirit and letter of the law. Both should be respected, and when the whole context demonstrates a particular intent of the legislature to effect a certain object, the purpose of the lawmakers should be carried out: *United States v. American Surety Co.*, 200 U. S. 197 (50 L. Ed. 437), 26 Sup. Ct. Rep. 168. This precedent is instructive and applicable to nearly every phase of the present case, and is controlling. If the statute in question should be given any other meaning, then the only thing necessary to be done to defeat its manifest purpose would be for a sufficient number of subcontracts to be made, and the subcontractor to make a default in payment to those with whom he has contracted for labor and materials supplied in the actual construction. The contractor obtained the benefit of the work performed by Swan. It was necessary for the purpose of carrying out the engagement with the city.

Truckmen transporting material for a short distance in order to prosecute the work under the contract accelerate the construction just as effectively as the man who mixes the concrete on the ground: *Ameri-*

can Surety Co. v. Cement Co. (C. C.), 110 Fed. 717; *McClain v. Hutton*, 131 Cal. 132 (61 Pac. 273, 63 Pac. 182, 622). It is not important whether he conveys the cement in an auto truck or on his back. Such labor comes within the meaning of the words "supplying labor or materials for any construction of the work." It is directly connected with the work of construction, and is essential thereto, and a person who performs it is entitled to bring an action on the bond for his benefit.

Nearly every point raised in this case has been discussed and decided by our federal courts in the decisions cited. In view of this we do not deem it advisable to multiply citations or discuss the subject at great length.

The findings of fact in the case at bar support the judgment of the lower court, which is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS CONCUR.

Argued October 25, dismissed November 16, 1915.

WEISER LAND CO. v. BOHRER.

(152 Pac. 869.)

Corporations—Foreign Corporations—Regulation—Declaration of Intention.

1. A foreign corporation, which purchases land in the state from a citizen of another state, has the deed recorded in the state, gives a mortgage, leases the property, contracts to sell a portion thereof, the formal papers and contracts being signed and executed in the other state, and holds and votes stock in a district improvement company organized in the state, is within Section 6727, L. O. L., requiring a foreign corporation to file a declaration of intention to engage in business with the state.

Corporations—Foreign Corporations—Regulation—Declaration of Intention.

2. A single isolated instance of dealing on the part of a foreign corporation is not within Section 6727, L. O. L., requiring such a corporation to file a declaration of intention to transact business within the state.

Abatement and Revival—Plea in Abatement—Waiver—Answering to Merits.

3. Where defendants, sued by a foreign corporation, filed a plea in abatement that the corporation had not complied with the statutes authorizing foreign corporations to transact business within the state, they did not waive such plea by answering and pleading to the merits when the plea was overruled.

[Jurisdiction over foreign corporations, see note in 85 Am. St. Rep. 905.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE MCBRIDE.

This is a suit by the Weiser Land Co., a corporation, against Josephine Bohrer and John Bohrer, to compel specific performance by defendants of a covenant to release certain land from the operation of a mortgage given by plaintiff to defendants. In August, 1912, plaintiff's grantors, who resided in Weiser, Idaho, entered into a contract to purchase certain lands of the defendants situated in Malheur County. Thereafter the plaintiff corporation was organized in Idaho and took over the contract, and having made a preliminary payment received a deed for the property, giving certain notes and a mortgage to secure the payment of the purchase price. The mortgage contained the following covenant:

"It is agreed that parties of the second part, or their executors, administrators, and assigns, are to execute and deliver to first party, its successors or assigns, partial releases of said lands from said mortgage lien as demand may be made on them, provided that party of the first part, its successors or assigns, shall pay to parties of the second part, their executors, administrators, or assigns, to be applied on said notes

herein, an amount which, added to what has heretofore been paid, will amount to \$75 per acre for each acre of lands so released from said mortgage lien aforesaid."

The plaintiff brings this suit claiming that sufficient payments have been made to equal in amount the sum of \$75 per acre for 225 acres of the land conveyed, setting up a demand by plaintiff for a release of said 225 acres and a refusal by defendants to make such release, and asking that they be required to specifically perform such covenant. The defendants filed a plea in abatement, the material parts of which are as follows:

"I. That at all the times mentioned in the said complaint the defendants were, and still are, residents of the county of Washington, in the State of Idaho.

"II. Further answering said complaint, the defendants allege: That the said plaintiff has not at any time filed with the Secretary of State or Corporation Commissioner of the State of Oregon, a written or any declaration of its desire and intention or purpose to engage in business within the State of Oregon, as required by Section 6727 of Lord's Compiled and Annotated Codes of said state, neither has it paid to the State of Oregon its last or any annual license or any other tax or fee that has become due and payable against it, neither has it at any time before or at the time of the commencement of this action, either by power of attorney or otherwise, appointed any attorney in fact within the State of Oregon, on whom process may be served, as required by Section 6726 of said Codes, and it had not at the time of the commencement of this action, or at any other time, any such attorney in fact within the State of Oregon, notwithstanding that at all the times mentioned in the said complaint, and at the time of the commencement of this action, the plaintiff was transacting business within the State of Oregon, by buying and selling lands therein, and cultivating, improving and irrigating lands for profit.

“III. That by reason of the fact that the plaintiff has not complied with the laws of the State of Oregon relating to foreign corporations, it has not legal capacity to sue, or prosecute its said action within the state.”

Plaintiff replied to the plea admitting that it was a foreign corporation and that it had not filed any written declaration of its intention to do business in the State of Oregon, paid any license, or appointed any resident attorney in the State of Oregon; and denied all other matters alleged in defendants' plea. It further alleged that all the contracts, agreements, and obligations alleged in the pleadings were made in the State of Idaho, and that plaintiff had not at any time transacted any business as a foreign corporation in the State of Oregon.

There was a trial on the issues thus formed, and, the plea being overruled, defendants answered to the merits, and upon issue joined there was a decree for plaintiff, from which defendants appeal.

SUIT DISMISSED.

For appellants there was a brief over the names of *Mr. Morton D. Clifford*, *Mr. J. W. Galloway* and *Mr. Leslie J. Aker*, with an oral argument by *Mr. Clifford*.

For respondent there was a brief over the names of *Messrs. McCulloch & Wood* and *Mr. Ed. R. Coulter*, with an oral argument by *Mr. Wells W. Wood*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. The testimony as to whether plaintiff was doing business in this state was largely extracted from its officers, who were necessarily unwilling witnesses; but we think that it sufficiently shows these facts: That

the plaintiff corporation was organized in Weiser, Idaho, after plaintiff's assignor had made the contract of purchase, and that the principal, if not sole, object of its organization, was to purchase, hold and dispose of the property in controversy. It is true that the corporate articles state:

"That the general nature of the business of this corporation shall be to buy, own, rent, lease, sell, trade, and deal in lands, real estate, mortgages, bonds, debentures, notes, and all manner of choses in action, to farm, cultivate, improve real estate, to buy, own, lease, and sell water and light plants, cold storage, ice and pumping plants and business; to own stocks in other corporations, to do a general real estate business, both as owner and as factor for others, to borrow and loan moneys, to execute, negotiate, assign, issue, put, take, receive and collect bills, notes, mortgages, and other securities, to pledge all and any of the corporate property, to secure any and all of the indebtedness of the corporation and secure its contracts, and generally to do and perform all acts and things and execute all papers, deeds, mortgages, contracts, and other instruments necessary and requisite to carry into effect the objects for which this corporation is formed."

—and that its president declares that other business than the purchase of this land was contemplated, but there is not a syllable of testimony that any other business was ever done. It purchased the land, had its deed recorded in Oregon, gave a mortgage which was only effective in Oregon, leased the property under a contract that the share of grain it was to receive as rent should be divided upon the land, contracted to sell a portion of the land, and generally held and managed it as a resident owner would have done; the only difference being that the formal papers and contracts in respect to it were signed and executed in Idaho. It was a holder of stocks in the Crystal District Im-

provement Company, an Oregon corporation, and of 38 of the bonds of said company, transferred by defendants to Coulter & Bradshaw and by them to plaintiff, and its representative appeared at the meetings of the company in Oregon and voted this stock in behalf of plaintiff. It is clear that the lands were purchased and held by the plaintiff principally for the purpose of sale and not for cultivation. It was as much a landed proprietor in Oregon and managing the tract as such as any other dealer in or owner of such real estate. While it is true that operations in respect to the lands were directed from across the line in Idaho, they were consummated in Oregon, and plaintiff is clearly within the reasoning of the cases of *Johnson v. Seaborg*, 69 Or. 27 (137 Pac. 191), and *Hirschfeld v. McCullagh*, 64 Or. 502 (127 Pac. 541, 130 Pac. 1131).

2. It is conceded that a single isolated instance of dealing is not within the statute: *Commercial Bank v. Sherman*, 28 Or. 573 (43 Pac. 658, 52 Am. St. Rep. 811); *Barse Live Stock Co. v. Range Valley Cattle Co.*, 16 Utah, 59 (50 Pac. 630). But the present transaction is more than that. It was the evident intent of the plaintiff to engage in this state in the business of buying and selling in reference to this particular tract and to act as a landed proprietor in regard to it, and not only this, but to participate as a stockholder in the business of the Crystal District Improvement Company, whose object was to irrigate these and other lands.

3. The defendants did not waive the plea in abatement by afterward answering and pleading to the merits: *Hirschfeld v. McCullagh*, 64 Or. 502 (127 Pac. 541, 130 Pac. 1131).

The plea in abatement will be sustained and the suit dismissed.

SUIT DISMISSED.

Argued October 25, affirmed November 16, 1915.

MALLETT v. TAYLOR.

(152 Pac. 873.)

Waters and Watercourses—Irrigation Ditches—Escape of Water—Overflow—Percolation.

1. In suits to restrain the owners of irrigation ditches from negligently permitting escape of water therefrom, there is no legal distinction between the escape of water by overflow and by percolation, where the cause of escape can be traced to its source and shown to originate in the ditch.

[As to what are percolating waters, see note in 67 Am. St. Rep. 663.]

Waters and Watercourses—Escape of Water—Liability—Negligence.

2. A person who by artificial means causes water to percolate through the soil to the injury of his neighbor does so at his peril, and is legally responsible therefor irrespective of negligence.

Waters and Watercourses—Irrigation Ditches—Escape of Water—Liability.

3. Where water was caused to percolate into lands adjoining an irrigation ditch because of the negligent failure of the owner of the ditch to construct a waste ditch, he was liable to the owners of the adjoining land for injury caused by his negligence.

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE MCBRIDE.

This is a suit brought by C. W. Millett against S. F. Taylor, as administrator of the estate of A. A. Brown, deceased, to restrain defendant from negligently permitting water used by him in irrigating his land to escape by overflow and percolation on or into the adjoining lands of plaintiff, whereby it was alleged that plaintiff's lands were rendered too wet and swampy for cultivation and the usefulness thereof for cropping purposes destroyed. The complaint, which is too voluminous for insertion here, was met by denials putting the whole matter in issue, and upon trial had there were findings and a decree for plaintiff, from which defendant's administrator appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. C. McGonagill* and *Mr. William E. Lees*, with an oral argument by *Mr. McGonagill*.

For respondent there was a brief over the name of *Messrs. McCulloch & Wood*, with an oral argument by *Mr. John W. McCulloch*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

The evidence in the case is somewhat contradictory, but upon the whole we are of the opinion that that produced by plaintiff is based upon more accurate data and that the findings of fact made by the Circuit Court are correct; and they are therefore adopted as the findings of this court. From these findings it appears that plaintiff and defendant are adjoining land owners, and that a portion of defendant's land is situated on a somewhat higher elevation than a tract of plaintiff's land adjacent thereto; that in irrigating his land defendant does it in such a careless manner that the waste water flows into a depression in the same and accumulates there, and thence flows or percolates through the soil over and wets the adjoining land of plaintiff, rendering it unfit for cultivation. It appears from the testimony that the damage caused by actual overflow is comparatively slight, but that the injury caused by percolation of water from the depression before alluded to is so great as to render several acres of plaintiff's land, to a great extent, unfit for cultivation, and that it is apparent, at a not exorbitant expense, defendant could prevent this injury by constructing a proper waste ditch. The evidence shows that he has failed and refused to construct such a ditch, contending here that an irrigator is not required.

by law to take care of water percolating through his soil into the lands of his neighbor.

1. It is believed that no legal distinction exists between the case of waters escaping by overflow and waters escaping by percolation, where the cause of such escape can be traced to its source and shown to originate in the ditch, and no case has been cited by counsel which makes such distinction. The case of *Fleming v. Lockwood*, 36 Mont. 384 (92 Pac. 962, 122 Am. St. Rep. 375, 13 Ann. Cas. 263, 14 L. R. A. (N. S.) 628), merely holds that a ditch owner is not liable for damages caused to adjoining lands by seepage unless it shall be shown that such seepage was the result of his negligence—a proposition upon which courts are divided, as will be hereafter shown. The case of *Woodland v. Portneuf-Marsh Valley Irr. Co.*, 26 Idaho, 789 (146 Pac. 1106), holds that the owner of a supply ditch furnishing water to settlers along its course is not liable for damages caused by seepage or overflow escaping from ditches owned and constructed by settlers obtaining water from the supply ditch, and incidentally declares, by way of *dictum*, that the owner of the ditch from which the damage resulted was not liable for such damage unless it was the result of his negligence. Beyond the fact that some of the courts hold that the owner of a ditch or dam causing damage by seepage or overflow is liable irrespective of negligence, while others hold that he is liable only for negligently permitting water to escape from such causes, the courts generally make no distinction between cases of damage arising from water escaping by overflow and those arising from seepage, and logically there can be no reason for any distinction.

2. The question is not new in this state, but was settled by the opinion of Mr. Justice MOORE, in *Esson v.*

Wattier, 25 Or. 7 (34 Pac. 756), wherein, after citing a number of authorities, this conclusion is reached:

“If a person, by artificial means, raises a volume of water above its natural level, and, by percolation, or by overflow, injures neighboring lands without license, prescription or grant from the proprietor, the latter may invoke the interposition of a court of equity, and obtain an injunction to prevent it, when he would sustain irreparable injury, or be compelled to bring a multiplicity of actions to recover the damages as they accrued.”

This case establishes the rule in this state that a person who by artificial means causes water to percolate through the soil to the injury of his neighbor does so at his peril and is legally responsible therefor irrespective of negligence. This rule follows the case of *Fletcher v. Rylands*, L. R. 3 H. L. 330, cited by Mr. Justice MOORE, wherein Mr. Justice BLACKBURN observes:

“If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril.”

Another case supporting this doctrine and in all material respects identical with the case at bar is *Parker v. Larsen*, 86 Cal. 236 (24 Pac. 989, 21 Am. St. Rep. 30). Other similar cases are: *Sylvester v. Jerome*, 19 Colo. 128 (34 Pac. 760), in which the court, while placing its decision upon a statute making owners of reservoirs liable for damages caused by leakage, observes that the statute is a mere affirmation of the common law: *Shields v. Orr Extension Ditch Co.*, 23 Nev. 349 (47 Pac. 194); *Wilson v. New Bedford*, 108 Mass. 261 (11 Am. Rep. 352); *Monson Mfg. Co. v. Fuller*, 15 Pick. (Mass.) 554; *Fuller v. Chickopee Falls*

Mfg. Co., 16 Gray (Mass.), 46; *Pixley v. Clark*, 35 N. Y. 520 (91 Am. Dec. 72).

“The owner of the land over which the ditch is constructed cannot be required to take the risk of injury to his property from percolation, and, if the ditch cannot be managed so as to prevent injury from this cause, the owner of the ditch must pay for the injury done thereby as part of the compensation to be made for the right of way; and if the injury can be prevented, and is not, the owner of the ditch is liable as for negligence”: *Farnham on Waters*, § 634.

3. In the instant case there is no need to invoke in all its severity the rule laid down in *Esson v. Wattier*, 25 Or. 7 (34 Pac. 756). The evidence tends to show that defendant provided no waste ditch, the construction of which would have prevented further injury, and, although plaintiff offered to provide a right of way at his own expense for such ditch, these reasonable proffers were rejected by defendant. The failure to provide this ditch was negligence which was the proximate cause of the injury, and all the authorities concur in holding a ditch owner or irrigator responsible in such a case: 10 Current Law, p. 2016; *Fleming v. Lockwood*, 36 Mont. 384 (92 Pac. 962, 122 Am. St. Rep. 375, 13 Ann. Cas. 263, 14 L. R. A. (N. S.) 628); *Jenkins v. Hooper Irr. Co.*, 13 Utah, 100 (44 Pac. 829); *McCarty v. Boise City Canal Co.*, 2 Idaho (Hasb.), 245 (10 Pac. 623), and cases there cited; *King v. Miles City Irr. Ditch Co.*, 16 Mont. 463 (41 Pac. 431, 50 Am. St. Rep. 506); *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343 (54 Pac. 1009, 72 Am. St. Rep. 784); *Denver v. Mullen*, 7 Colo. 345 (3 Pac. 693); *Howell v. Big Horn Basin Colonization Co.*, 14 Wyo. 14 (81 Pac. 785, 1 L. R. A. (N. S.) 596). In the briefs of counsel in the case last mentioned as reported in L. R. A. will be

found citations of the principal cases relating to this subject. It is curious to notice that, in the earliest law on the subject of irrigation known to mankind and promulgated in such a remote past that the common law seems comparatively a recent innovation, the rule announced in the foregoing cases was declared. In the laws of Hammurabi, who reigned over Assyria 700 years before the time of Moses, we find this statute:

“If a man neglect to strengthen his dyke and do not strengthen it, and a break be made in his dyke and the water carry away the farm land, the man in whose dyke the break has been made shall restore the grain which he has damaged. If he be not able to restore the grain, they shall sell him and his goods and the farmers whose grain the water has carried away shall share in the results of the sale”: Harper’s Code of Hammurabi, §§ 53, 54.

If we eliminate the severe “proceedings supplemental to execution,” the law is practically the same to-day as it was in the year 2250 B. C.

In the case at bar we are satisfied that the defendant has conducted his irrigating operations so carelessly and with such disregard of the rights of plaintiff that the court was right in enjoining their further continuance in that manner. That cases must often arise whereby accident such as sudden floods or unusual rains or other accidents, damage may occur to adjoining fields which could not reasonably have been foreseen, and for which no action will lie, seems to be established by the later authorities; but to hold that a man may lawfully construct a ditch which from the manner of its construction must necessarily occasion substantial injury to the land of his neighbor either by overflow or by percolation, or that he can lawfully so irrigate his land as to do such substantial injury,

would be to grant him an easement in such adjacent land without compensation, and this the law will not permit.

The decree is affirmed.

AFFIRMED.

On motion to dismiss appeal, argued October 8, allowed November 16, 1915.

MITCHELL v. STURTEVANT.

(152 Pac. 875.)

Appeal and Error—Transcript—Dismissal.

1. Under Section 554, L. O. L., as amended by Laws of 1913, page 618, providing that appellant, within 30 days after perfecting his appeal, shall file in the appellate court a transcript of such an abstract as the rules of that court may require, or so much of the record as is necessary to intelligibly present the questions to be determined by that court, the original files in the court below, without any certificate identifying them, and without an abstract as required by Supreme Court rule 6 (117 Pac. ix), or any explanation for failure in that regard, filed on appeal from an order of the Circuit Court after notice of appeal was served and filed, did not constitute the transcript required on appeal, and the appeal would be dismissed.

From Lane: **GEORGE F. SKIPWORTH**, Judge.

In Banc. Statement by **MR. JUSTICE BENSON**.

This is a proceeding by Lucy Belle Mitchell, objecting to the final account of Mary E. Sturtevant, executrix of the estate of Joseph K. Sturtevant, deceased. From an order dismissing an appeal to the Circuit Court, plaintiff appeals. Respondent now moves to dismiss the appeal to this court. Motion allowed and appeal dismissed.

DISMISSED.

Mr. Fred E. Smith and Mr. M. Vernon Parsons, for the motion.

Mr. George B. Dorris, contra.

MR. JUSTICE BENSON delivered the opinion of the court.

1. The order was made and entered by the lower court on April 10, 1915. The notice of appeal was served on April 19th, and filed on April 21st. On May 5th a mass of papers which appear to be the original files, both in the Probate and Circuit Courts, but without any certificate identifying them, were fastened together and filed here. No abstract or other paper was filed in this court until July 22d, when the motion now under consideration was filed. Thereafter, on July 28th, appellant filed her brief. The papers filed on May 5th do not constitute such a transcript as is required by statute (Section 554, L. O. L.; Laws 1913, p. 618), or by the rules of this court. Neither is there any abstract on file herein, as required by Rule 6 of this court (117 Pac. ix), nor has appellant offered any explanation or excuse for her failure in this regard.

It follows that the motion to dismiss must be allowed; and it is so ordered. **APPEAL DISMISSED.**

Motion to dismiss argued October 25, dismissed November 16, 1915.

BARTON v. YOUNG.

(152 Pac. 876.)

Appeal and Error—Notice of Appeal—Persons upon Whom Notice Should be Served—"Adverse Party."

1. In a suit to foreclose laborers' liens on mining claims, plaintiff named as defendants, in addition to the owner and a lessee of the claims, parties alleged to have liens thereon subsequent in time and right to plaintiff's claim, one of whom answered, denying some of the averments of the complaint and asking the foreclosure of his lien. On motion of the owner of the claims, the court struck out all of the items alleged in the complaint, and plaintiff appealed from the decree, but served his notice of appeal on none of the defend-

ants except such owner. *Held* that, under Section 550, L. O. L., providing that if an appeal is not taken at the time of the decision, order, judgment or decree is rendered or given, the party desiring to appeal may cause a notice to be served on such adverse party or parties as have appeared, the Supreme Court did not acquire jurisdiction of the appeal, since an "adverse party," within the statute, is every party to an action, suit or proceeding whose interest in respect to the final determination rendered therein is or might be in conflict with a modification or reversal of the decision, order, judgment or decree.

From Malheur: DALTON BIGGS, Judge.

This is a suit to foreclose alleged laborers' liens. From a decree of the lower court favoring defendants, plaintiff appeals. Respondents now move to dismiss the appeal.

APPEAL DISMISSED.

Mr. William H. Brooke and Mr. Ralph W. Swagler,
for the motion.

Mr. George W. Hayes, contra.

In Banc. Opinion by MR. CHIEF JUSTICE MOORE.

This is a motion to dismiss an appeal. A suit was commenced by T. A. Barton against F. O. Young, N. J. Minton, John Carpenter and J. W. Sheridan to foreclose alleged liens. The plaintiff's claim in his own right was for boarding laborers who were employed in operating mining claims in Malheur County, Oregon, amounting \$485.05. His other demand was for labor performed by such employees, amounting to \$1,068.40. The complaint gave the names of such laborers, the number of days each was employed, and the wages he was to receive therefor. In referring thereto and to the plaintiff herein, the complaint reads:

"That said claims and accounts for the labor performed by the said individuals, and each of the said individuals, have been assigned to this claimant prior to the filing of this lien."

Another clause of the initiatory pleading is as follows:

“That the said defendants John Carpenter and J. W. Sheridan are lienholders against the said property, and by reason thereof claim some rights and interests therein, but that the claims of said defendants are subsequent in time and right to the claim of this plaintiff.”

Carpenter's answer denied some of the averments of the complaint and for affirmative relief set forth his alleged lien against the same mining claims, amounting to \$279.75, and prayed foreclosure, etc. Minton, the owner of the mining claims, answered Carpenter's cross-complaint denying many averments thereof. For a separate defense he alleged that by a written lease he demised the real property sought to be encumbered to Young, who covenanted that he would pay all indebtedness incurred in operating the mines, which lease was duly recorded in that county, July —, 1914; that on September 9th of that year, and while Young was operating the mines, Minton caused to be put up thereon notices, specifying the time and place of such posting, as provided in Section 7444, L. O. L., warning all persons that he would not be responsible for any debt contracted by the lessee, in the operation of the mines under the lease; and that Carpenter had notice and knowledge of such warning before performing any work in, on, or at the mines. The prayer of the answer is that the cross-complaint be dismissed. Carpenter's reply controverted the averments of new matter in such answer. Minton thereupon moved to strike from Barton's complaint all averments of his individual claim of \$485.05, on the ground that the items thereof were nonalienable under the statute of this state. He also moved to strike from such complaint all allegations therein relating to causes so assigned

to Barton, for the reason that the right to a lien was personal and a transfer of a claim did not empower the assignee to perfect a lien therefor. This motion was allowed, and Barton undertook to appeal from such decree by addressing his notice therefor, "To N. J. Minton one of the above-named defendants," and to his attorneys, naming them, one of whom acknowledged in writing the service of a duly certified copy of such notice. An undertaking on appeal was given, served, and filed, and, a transcript having been sent up, the motion first referred to herein was interposed on the ground that, since the notice of appeal was not served on all parties who might be injuriously affected by a reversal or modification of the decree, jurisdiction of the cause has not been secured by this court.

The statute regulating the procedure in such cases reads:

"Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom. The party appealing is known as the appellant, and the adverse party as the respondent": Section 549, L. O. L.

"If the appeal is not taken at the time the decision, order, judgment, or decree is rendered or given, then the party desiring to appeal may cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney, at any place in the state, and file the original, with proof of service indorsed thereon, with the clerk of the court in which the judgment, decree, or order is entered": Section 550, L. O. L.

An "adverse party," within the meaning of this statute, is every party to an action, suit or proceeding whose interest, in respect to the final determination rendered therein, is or might be in conflict with a modification or reversal of the decision, order, judgment,

or decree so given or rendered: *Lillienthal v. Caravita*, 15 Or. 339 (15 Pac. 280); *Hamilton v. Blair*, 23 Or. 64 (31 Pac. 197); *The Victorian*, 24 Or. 121 (32 Pac. 1040, 41 Am. St. Rep. 838). In *Lane v. Wentworth*, 69 Or. 242, 245 (133 Pac. 348, 349), Mr. Justice BURNETT, discussing this subject, says:

"It has constantly been determined by this court that, although parties are both plaintiffs or both defendants, yet if an appeal would unfavorably affect the rights of one of them, as determined by the decree appealed from, he is an adverse party as respects his co-plaintiff or codefendant, and that the jurisdiction of this court depends upon service of the notice upon all such parties"—citing many Oregon decisions on this subject.

The plaintiff's counsel, contending that the notice of appeal herein was sufficient, relies upon the case of *Watson v. Noonday Mining Co.*, 37 Or. 288 (55 Pac. 867, 58 Pac. 36, 60 Pac. 994). That was a suit to foreclose a lien upon a mining claim. The John A. Roebeling's Sons Company, a foreign corporation, was made a defendant; the complaint charging that it had or claimed some interest in the premises, but that its right thereto was inferior to the plaintiff's lien. That corporation answered denying such averment and alleging facts showing it had a valid lien against the property, which encumbrance it was asserted was superior to Watson's. The mining company answered putting in issue the validity of such liens. A trial being had resulted in a decree foreclosing both liens. The Noonday Mining Company appealed, but it was insisted that the service of the notice upon the foreign corporation was insufficient to confer jurisdiction, and motion was interposed to dismiss the appeal on that ground. The motion was denied, the court holding

that the Roebling's Sons Company was not an adverse party, since its interests under the decree could not be affected by a reversal or modification thereof, but that such foreign corporation would be benefited by an alteration of such final determination, for a change of that kind would enhance the value of its security.

In the case at bar, since the plaintiff's alleged liens were not foreclosed but were determined invalid, a reversal or modification of the decree will not benefit either of the other parties who were not served with the notice of appeal, but such change must necessarily result in a detriment to each.

The notice in question not having been served on all the adverse parties, this court never secured jurisdiction of the appeal, and hence it is dismissed.

APPEAL DISMISSED.

Argued October 25, affirmed November 16, 1915.

EDWARDS v. CASE.

(152 Pac. 880.)

Attachment—Writ of Attachment—Force and Effect.

1. Under Section 298, L. O. L., providing that a writ of attachment shall be directed to the sheriff of any county in which property of the defendant may be, and that several writs may be issued at the same time to the sheriffs of different counties, a writ of attachment directed to a particular sheriff is of no force or effect outside of his county.

Garnishment—Service of Notice of Garnishment—Persons Authorized to Serve.

2. Under Section 298, L. O. L., relative to writs of attachment, and Section 300, providing that the sheriff to whom the writ is directed and delivered shall execute it without delay, a sheriff was not authorized to serve a writ of attachment directed to the sheriff of another county, and his service of a notice of garnishment created no lien upon any debt due from the garnishee to the defendant.

Garnishment—Notice of Garnishment—Requisites.

3. A notice of garnishment should be directed to the person, firm or corporation having possession of property of, or owing a debt to, the defendant named in the writ of attachment, warning the garnishee that such goods and chattels or choses in action are attached and garnished to answer the plaintiff's demands when evidenced by a judgment.

Corporations—Notice of Garnishment—Requisites—"Interest."

4. While a debt due from a corporation is undoubtedly an "interest" therein within Section 300, subdivision 3, L. O. L., providing that personal property other than that capable of manual delivery shall be attached by leaving a certified copy of the writ and a notice specifying the property attached, if the property be rights or shares in the stock of an association or corporation or interests or profits thereon, with such person or officer of such association or corporation as a summons is authorized to be served upon, and a lien is impressed upon such debt by leaving a notice specifying the property attached with the person or officer upon whom a summons may be served, the notice must be addressed to the corporation, and not to such person or officer, and no lien on a debt due from a corporation was created by delivering to the corporation's attorney in fact a notice addressed to him.

Garnishment—Appearance of Garnishee—Effect.

5. Where a notice of garnishment, by means of which it was sought to attach a debt due the defendant from an insurance company, was addressed to the company's attorney in fact, instead of the company itself, and was served by a sheriff other than the sheriff to whom it was directed, the fact that the attorney in fact and the insurance company's general adjuster gave certificates in response to the notice, showing that the company had insured the defendant's stock of goods, did not confer jurisdiction of the subject matter of the debt undertaken to be garnisheed, as the garnishee cannot, by voluntarily appearing, waive defendant's rights, especially as attachment proceedings, though of ancient origin, are not of common-law origin, but in derogation thereof.

Garnishment—Liability of Garnishee—Evidence.

6. Where plaintiff, in an action in which a writ of attachment was served upon an insurance company, believing the certificates of the garnishee in response to the notice of garnishment to be insufficient, filed allegations and interrogations equivalent to a complaint in a cause of action in her favor against the garnishee, but, though the insurance company's answers to such interrogatories showed the issuance of a policy of insurance to the defendant and the destruction of the insured property by fire, they did not disclose a debt for any specific sum as being due defendant on account of the fire, or admit any liability therefor, and plaintiff offered no other evidence, no judgment could have been rendered against the garnishee based on such answers.

[As to defenses of garnishee, see notes in 13 Am. Dec. 341; 100 Am. Dec. 511.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This was an action in the Circuit Court of Malheur County, Oregon, by Mrs. J. S. Edwards against Mrs. Ellen Case, to recover the amount of two promissory notes. The facts, as far as deemed material herein, are that the plaintiff duly secured a writ of attachment, which was directed to the sheriff of that county, who, pursuant thereto, seized some personal property of the defendant to satisfy any judgment that the plaintiff might obtain. Proof of such service was indorsed on the writ, which was thereupon sent to the sheriff of Multnomah County, who returned it June 17, 1914, with indorsements thereon as follows:

“State of Oregon,

County of Multnomah—ss:

“I hereby certify I received the within writ of attachment on the 7th day of May, 1914, and executed the same within said county and state on the 7th day of May, 1914, by delivering a true and correct copy of said writ of attachment, prepared and certified to by me as sheriff, together with a notice of garnishment, to Fireman’s Fund Insurance Company of San Francisco by delivering the same to Henry B. Tickner, special agent for the above-named Fireman’s Fund Insurance Company of San Francisco personally and in person, thereby garnishing and attaching all property, debts, money, dues, rights and credits of every nature in their hands or under their control, and especially a certain sum of money belonging or owing the within named defendant, to which said garnishment the said Fireman’s Fund Insurance Company of San Francisco, garnishee herein, has made an answer, which said answer is hereto attached and made a part of this return.

“Dated at Portland, Oregon, May 14, 1914.

“T. M. WORD,

“Sheriff of Multnomah County, Oregon,

“By MARTIN T. PRATT,

“Deputy Sheriff.”

"Portland, Oregon, May 13, 1914.

"T. M. Word, Sheriff Multnomah County, Portland, Oregon.

"Dear Sir: I am in receipt of garnishee notice in the case of *Mrs. J. S. Edwards of Vale, Oregon, v. Mrs. Ellen Case*, and would advise that another garnishee notice in the case of *Lowengart & Company v. Mrs. Ellen Case* reached me yesterday having followed me around on a trip. I am forwarding these notices to the Fireman's Fund Insurance Company at San Francisco and would advise that while we have issued an insurance policy in favor of Mrs. Ellen Case at Vale, I have not yet received official notice of any loss or damage under such policy, and am not prepared to admit that the Fireman's Fund Insurance Company owes Mrs. Case under the above policy.

"Yours truly,

"HENRY B. TICKNER,

"General Agent.

"Received, T. M. Word, May 14, 1914, Sheriff of Multnomah County, Oregon."

"San Francisco, Cal., May 16, 1914.

"Mr. T. M. Word, Sheriff Multnomah County, Portland, Oregon.

"Dear Sir: In re loss 149344, Case, Vale. We acknowledge receipt of attachment of Mrs. J. S. Edwards against Mrs. Ellen Case, and in reply will state that the Fireman's Fund has a policy of insurance in favor of Mrs. Ellen Case for \$1000.00 on property on which a loss was reported, and is now in course of adjustment.

Yours very truly,

"CHAS. R. THOMPSON

"General Adjuster.

"Amended return in re *Mrs. J. S. Edwards v. Mrs. Ellen Case*.

"T. M. WORD,

"Sheriff.

"MR. HARRY S. BLACK,

"Deputy."

The notice of garnishment, referred to, reads:

"In the Circuit Court of the State of Oregon for the
County of Malheur.

"Mrs. J. S. Edwards,	} Plaintiff,
v.	
Mrs. Ellen Case,	
	} Defendant.

"To Henry B. Tickner:

"You are hereby notified that by virtue on [of] a writ of attachment issued out of said court in the above-entitled action to me directed (a certified copy of which is herewith served upon you) all debts, property, moneys, rights, dues, or credits of every nature, in your hands or under your control, and especially a certain insurance contract policy or obligation issued by Fireman's Fund Insurance Company to Mrs. Ellen Case belonging or owing to said Mrs. Ellen Case, are hereby attached and garnisheed and you are hereby required to furnish forthwith a written statement of all such property or credits.

"May 7, 1914.

"T. M. WORD:

"By MARTIN T. PRATT,

"Deputy Sheriff, Multnomah County."

The plaintiff on August 31, 1914, secured a judgment against Mrs. Case for the sum demanded, and also obtained an order of the court directing a sale of the specific articles of personal property so seized. No order was made, however, for the sale or disposal of her claim or demand against the insurance company for loss or damage of goods by fire. Mrs. Edwards, on January 20, 1915, deeming the certificates given by the agents of the insurance company insufficient, filed allegations and interrogations, equivalent to a complaint in a cause of action existing in her favor against the Fireman's Fund Insurance Company, setting forth

the facts as hereinbefore stated, and secured an order of court requiring such interrogations to be answered. The insurance company denied most of the averments of the ancillary proceedings, and in addition to the statements so indorsed upon the writ of attachment, set forth the notice of garnishment, and alleged that Mrs. Case's stock of goods, so insured, was destroyed by fire May 2, 1914; that the circumstances of the fire had been investigated by the garnishee, which was not thereby convinced of its liability under the policy; that on May 5, 1914, Lowengart & Co., a corporation, commenced an action in the Circuit Court for Multnomah County against Mrs. Case to recover \$1,287.71, and on November 11th of that year she assigned all her interest under the policy and to the loss and damage to her goods by fire to that plaintiff, which is the owner and holder thereof; that on January 6, 1915, a judgment was rendered in that action against Mrs. Case for the sum demanded; that no writ of attachment was issued out of the Circuit Court of Multnomah County, directed to the sheriff of Multnomah County in the action first mentioned herein; that the notice of garnishment referred to was addressed to Henry B. Tickner personally, who did not then have, nor has he since secured, possession of any property, money, etc., belonging to or due Mrs. Case. A reply put in issue the answers of new matter to the interrogations, and, the cause having been tried by the court, findings of fact were made in substance as hereinbefore stated and to the effect that Henry B. Tickner, to whom the notice of garnishment was given, was then the duly appointed attorney in fact of the Fireman's Fund Insurance Company, which notice was directed to him personally. As conclusions of law the court found

that the service of the notice of garnishment did not constitute a valid notice to the insurance company, and that Mrs. Edwards was not entitled to a recovery of any sum of money against that company. Based on these findings, a judgment was rendered in accordance therewith, and the plaintiff appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. George W. Hayes*.

For respondent there was a brief over the names of *Mr. Otto J. Kraemer* and *Messrs. Huntington & Wilson*, with an oral argument by *Mr. Kraemer*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. Our statute declares generally that a writ of attachment shall be directed to the sheriff of any county in which property of the defendant may be, and that several writs may be issued at the same time to the sheriffs of different counties: Section 298, L. O. L. The sheriff to whom the writ is directed and delivered shall execute the same without delay. A debt is attached by leaving with the debtor a certified copy of the writ and a notice specifying the property upon which a lien is thus sought to be established.

“If it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of such association or corporation as this Code authorizes a summons to be served upon”: *Id.*, § 300, subd. 3.

It will thus be seen that a writ of attachment, directed to a particular sheriff, is of no force or effect outside the county of which he is the chief executive and administrative officer: *Wade, Attach.*, § 124.

2. The writ in the case at bar not having been directed to the sheriff of Multnomah County, Oregon,

that officer was not authorized to serve it; and, this being so, no lien upon any debt due from the insurance company to Mrs. Case was created by the delivery of the notice of garnishment, based on the command to attach her property.

3, 4. It will be remembered that such notice was addressed to Henry B. Tickner, and warned him that all debts, etc., in his hands or under his control and especially an insurance policy issued by the Fireman's Fund Insurance Company, belonging to and owned by Mrs. Case, was thereby attached and garnisheed. A notice of garnishment should be directed to the person, firm or corporation having possession of property of, or owing a debt to the defendant named in the writ of attachment, warning the garnishee that such goods and chattels or choses in action are attached and garnisheed to answer the plaintiff's demands, when evidenced by a judgment. A notice of garnishment to attach a debt due from a corporation should, like a summons or any other process, warn such artificial being that a sum of money due from it, or to mature in favor of a defendant in an action has been attached and garnisheed. A debt due from a corporation is undoubtedly an "interest" therein, whereby a lien is impressed upon the obligation by leaving with the person or officer of such corporation upon whom a summons may be legally served a copy of the writ of attachment and a notice specifying the property attached: Section 300, L. O. L. Such notice, however, should be addressed to the corporation, and not to such person or officer: Drake, Attach., § 470. The garnishee sought to be charged was not so addressed, and, in the absence of such direction, another reason exists for concluding that no lien upon any debt that might be due Mrs. Case was created by delivering to Henry B. Tickner, the

attorney in fact of the Fireman's Fund Insurance Company the notice mentioned.

5. It is argued by plaintiff's counsel, however, that the attorney in fact and the general adjuster of the insurance company having given certificates in response to such notice of garnishment, whereby it appears that their principal had insured Mrs. Case's stock of goods against loss or damage by fire in the sum of \$1,000, jurisdiction of the debt was thereby secured, and, this being so, an error was committed in denying the relief sought against the Fireman's Fund Insurance Company. The procedure prevailing in the United States of securing by attachment the payment of a judgment which might subsequently be obtained in an action evidently had its origin in the customs of the city of London, and though such practice was very ancient, it was not of common-law origin but in derogation thereof: *Drake, Attach.*, § 1.

"Attachment proceedings," says Mr. Justice THAYER in *Schneider v. Sears*, 13 Or. 69, 74 (8 Pac. 841, 843), "are statutory, and unless the statute is strictly pursued, no right is acquired under them."

To the same effect see, also, *Case v. Noyes*, 16 Or. 329, 333 (19 Pac. 104); *White v. Johnson*, 27 Or. 282, 297 (40 Pac. 511, 50 Am. St. Rep. 726).

"A garnishee," says Mr. Justice BEAN in *Altona v. Dabney*, 37 Or. 334, 336 (62 Pac. 521, 522), "stands in the position of a disinterested stakeholder, and therefore, according to the great weight of authority, cannot waive service of the process by which the property in his hands, or the debt due from him to the principal debtor, is garnisheed."

In *Barr v. Warner*, 38 Or. 109, 111 (62 Pac. 899), it is said:

"A garnishee may waive many irregularities in the notice of garnishment, and by his certificate or answer

in response thereto submit himself to the jurisdiction of the court, and thus become in privity with, and in effect a party to, the judgment which has been or may be rendered against his creditor (citing authorities); but, while a garnishee may waive jurisdiction of his person, he cannot, by voluntarily appearing, waive the defendant's rights, or substitute the latter's creditor for his own, because that relates to the jurisdiction of the subject matter, which can be acquired only in the manner prescribed by law."

To the same effect is the ruling in the case of *Fraley v. Hoban*, 69 Or. 180, 186 (133 Pac. 1190, 137 Pac. 751), and *Price v. The Boot Shop*, 75 Or. 343 (146 Pac. 1088).

We conclude, therefore, that the certificates of the attorney in fact and of the general adjuster of the insurance company were insufficient to confer jurisdiction of the subject matter of the debt undertaken to be garnisheed.

6. No other evidence appears to have been offered by the plaintiff than the answers of the insurance company to her written interrogations, and since such responses do not disclose a debt for any specific sum as being due Mrs. Case on account of the loss of or damage to her stock of millinery by fire, or admit any liability therefor, no judgment could have been rendered against the garnishee, based on such answers: 20 Cyc. 1116; Drake, Attachment, § 659; Rood, Garnishment, § 314.

For these reasons, the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Argued October 15, affirmed November 16, 1915.

BOUCHET v. OREGON MOTOR CAR CO.*

(152 Pac. 888.)

Evidence—Parol Evidence—Writing not Embodying Entire Agreement.

1. Plaintiff purchased a second-hand automobile for his grocery business, which defendant represented had been repaired and to be in good condition, and, at the conclusion of the sale, and on request for a receipt, was given a blank sale form, which he signed, and which provided that there were no agreements or representations not expressed therein, but which was not filled out as though intended to be a contract between the parties, and which referred to "the goods hereby ordered," and stated, "This order is not binding upon you [Oregon Motor Car Company] until accepted in writing signed by —," and which contained nothing bearing on the transaction, except the words "One Maxwell, \$400.00," and "Deposit, \$400.00." At the trial the president of defendant company and its witnesses testified to certain representations, none of which were found in the writing. *Held*, that plaintiff might show by parol evidence the circumstances of the contract of sale, the defendant's representations, the kind of machine intended to be purchased, and defendant's warranty, since for a writing to be within the parol evidence rule it must be the final repository of the entire agreement.

[As to parol evidence to show warranty outside of contract, see note in 5 Am. St. Rep. 197.]

Sales—Special Use—Implied Warranty.

2. Where a second-hand automobile was sold as fit for the purchaser's stated purpose of using it in his grocery business, there was an implied warranty that it was reasonably suitable for that purpose.

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

1. This is an action by Leo Bouchet against the Oregon Motor Car Company, a corporation, for damages for misrepresentations in the sale of a second-hand "1910 model G, 4-cylinder Maxwell automobile." The action was tried before a jury. A verdict was ren-

*As to exceptions to parol evidence rule, see note in 17 L. E. A. 272.

On implied warranty of fitness of property bought for special purpose, see notes in 22 L. E. A. 187; 15 L. E. A. (N. S.) 868; 31 L. E. A. (N. S.) 783; 34 L. E. A. (N. S.) 737.

On warranty upon sale of second-hand article, see note in L. E. A. 1915B, 477.

dered in favor of plaintiff for \$450. From a judgment thereon, defendant appeals.

Plaintiff alleged, in substance, that on September 16, 1913, the defendant falsely and knowingly represented to plaintiff that the automobile was of the value of \$400, in first-class repair, and in good condition to be operated; that the gearings, bushings, brake gearing pinion, tires, engine and magneto were all in excellent condition, when, in fact, they were worn out; that the machine was useless, and worth no more than \$50, which defendant knew; that plaintiff believed and relied upon the statements, and purchased the car to use in his grocery business, as he informed defendant; that he was immediately compelled to have all of said parts replaced and the automobile repaired and overhauled at an expense of \$250, and was thereby caused a loss of time and damaged in the sum of \$200; that the machine, after being repaired, was worth no more than \$200—all to his damage in the sum of \$650.

By its answer the defendant denied any false representations or damages in the premises, and averred, in substance, that it informed plaintiff that on August 19, 1913, the automobile had been taken at \$420, in exchange for a new car from a person who stated that the rear end of the machine had just been overhauled, and that it was in good repair; that the defendant did not know its condition other than as so represented; that in purchasing the machine plaintiff relied upon his own judgment and that of a man who was with him for the purpose of examining the same and advising him. Defendant further alleged that a written contract for the sale of the car was entered into by the parties, a copy of which was attached to the answer as an exhibit.

The reply put in issue the affirmative matter of the answer, except that plaintiff asserted, in effect, that the alleged contract of sale was, as represented by defendant, a receipt for \$400 executed by the parties upon a blank form. The evidence tended to support the complaint and to show that the car was in bad condition, "poor junk," and not fit for use. Plaintiff testified in part that he told defendant he desired the car to use in delivering groceries, and said:

"We talked this Maxwell car over. Let's see, now; yes; we looked the Maxwell over and cranked the engine, and we started the engine. Not only that, but he [Mr. Winchell, president of the company] said, 'I put \$60 worth of new gears in the back of that machine.' I had no way of telling whether he put the gears in there or not. He says, 'I will call my foreman down, and I will tell you exactly what he did with that machine.' He rang the bell, and the foreman came down, and he says, 'Yes; I put the new gears in there, and, besides, we put two new axles in there'; and they recommended the machine. * * He said, 'If you are not satisfied with that machine in every way, I will give you your money back.' "

AFFIRMED.

For appellant there was a brief over the names of *Mr. F. E. Grigsby*, *Mr. William C. Bristol* and *Mr. Robert Tucker*, with an oral argument by *Mr. Grigsby*.

For respondent there was a brief over the name of *Messrs. Wilson, Neal & Rossman*, with an oral argument by *Mr. George Rossman*.

MR. JUSTICE BEAN delivered the opinion of the court.

The document signed at the time of the sale to plaintiff in so far as deemed necessary to note was as follows:

"No. ————— Date, Sept. 16/13.
 "Town, Portland. State, Ore.

"Duplicate Studebaker Retail Sales Order.

"Instructions: * *

"To Oregon Motor Car Co. [Dealer or Branch.]

"Please enter my order for one Maxwell automobile model, * * with standard equipment, except as otherwise specified herein, to be delivered on or about Sept. 16, 1913, or prior thereto at your option. In case the automobile is not ready for delivery as specified, the deposit shall be returned to the undersigned. [Here follows the blank form as to the title remaining with the seller until payment in full and a stipulation not to assign the order.] There are no understandings, agreements, or representations, expressed or implied, not specified herein, respecting the goods hereby ordered. The N. A. A. M. standard warranty, under which this car is manufactured, is printed on the back of this agreement. This order is not binding upon you until accepted in writing, signed by ———. (The defendant relies upon this latter clause.)

Price of automobile, standard equipment....	\$.....
Extra equipment at following prices.....	\$.....
One Maxwell.....	\$400.00
Freight	\$.....
Total	\$400.00
Deposit	\$400.00
Balance to be paid to dealer or branch upon delivery of car.....	\$.....

"LEO BOUCHET. [Purchaser.]

"760 Alberta St., Portland.

"Accepted: OREGON MOTOR CAR CO. 191—

"By E. R. WINCHELL."

On the back of the order is the following:

"N. A. A. M. Standard Warranty

"Adopted May 4th, 1910.

"We warrant the motor vehicles manufactured by us for ninety days after the date of shipment, this warranty being limited to the furnishing at our factory

of such parts of the motor vehicle as shall, under normal use and service, appear to us to have been defective in material or workmanship.

"This warranty is limited to the shipment to the purchaser, without charge, except for transportation, of the part or parts intended to replace the part or parts claimed to have been defective, and which, upon their return to us at our factory for inspection, we shall have determined were defective, and provided the transportation charges for the parts so returned have been prepaid.

"We make no warranty in respect of tires or rims.

"The condition of this warranty is such that if the motor vehicle to which it applies is altered, or repaired outside of our factory, our liability under this warranty shall cease.

"The purchaser understands and agrees that no warranty of the motor vehicle is made or authorized to be made by the company, other than herein set forth."

1. Upon the trial, over the objections of defendant, plaintiff was permitted to testify as to the statements and representations made by the former at the time of the sale of the car. Defendant's counsel saved exceptions to the introduction of oral evidence upon the ground that it was an attempt to vary the terms of a written contract. In explaining plaintiff testified that when he paid the defendant \$400 for the car he asked for a receipt, and Mr. Winchell said, "I will write it on one of our regular forms," that he did so, and both signed it.

There is nothing in the paper bearing upon the transaction except the words "One Maxwell, \$400.00," and "Deposit, \$400.00." The answer of the defendant set forth the representations which it claims were made to plaintiff at the time of the sale, and upon the trial the president of the company and its witnesses testified to certain representations which they claim were made,

none of which are found or referred to in the written memorandum. The instrument itself does not appear to be a statement of the entire transaction between plaintiff and defendant. It is not a bill of sale. Bouchet was not ordering a new or any kind of a car. The trade had already been made and the price paid when the paper was signed. Attempt to apply the restriction in the clause relied upon by defendant, and we find that it refers to "the goods hereby ordered"; yet none were ordered. The following also appears:

"This order is not binding upon you [Oregon Motor Car Company] until accepted in writing signed by _____."

By whom the same should be accepted or signed is not manifest. In other words, the blank form was not filled out as though intended to be used or relied upon as a contract between the parties. Plaintiff insists that the clause referred to was no part of the contract. The defendant asserts that the warranty printed upon the back of the order does not apply to the automobile in question; yet this is referred to in the same paragraph with the restriction which defendant would apply. If a part of the printed form should be considered, we see no reason why the whole should not be given effect. We are inclined to the belief that both parties are right in these contentions, and that all the printed form should be rejected, as it appears the parties intended.

Under all the conditions, it was proper for the plaintiff to show by parol evidence the circumstances of the contract of sale, what representations the defendant made, what kind of an automobile was intended to be purchased, and that the defendant warranted the car: *Ganson v. Madigan*, 15 Wis. 144 (82 Am. Dec.

659); *Smith v. Vose Piano Co.*, 194 Mass. 193 (80 N. E. 527, 120 Am. St. Rep. 539, 9 L. R. A. (N. S.) 966); *Hannah v. Shirley*, 7 Or. 115; *Randall v. Fay*, 158 Mich. 630 (123 N. W. 574).

In order for a writing to be protected by the parol evidence rule, it must be the final repository of the agreement. There must be an integration of the entire agreement into the writing; a writing drawn up for some other purpose than a final and complete repository of the agreement is not the subject of the parol evidence rule: Wigmore on Evidence, §§ 2429, 2430; *Cook v. Darling*, 160 Mich. 475 (125 N. W. 411).

Jones on the Construction of Contracts, Section 134, states:

“The test of the completeness of the writing, proposed as a contract, is the writing itself. If this bears evidence of careful preparation of a deliberate regard for the many questions which would naturally arise out of the subject matter of the contract, and if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract. In every case, therefore, the writing must be critically examined in the light of its surrounding circumstances, with a view of determining whether it is a memorial of the transaction.”

2. It appears that this car was sold as fit for a special purpose known to the defendant company. There is therefore an implied warranty that the car was reasonably suitable for the purpose for which it was sold: *Gold Ridge Min. Co. v. Tallmadge*, 44 Or. 34 (74 Pac. 325, 102 Am. St. Rep. 602); *Puritan Mfg.*

Co. v. Westermire, 47 Or. 557 (84 Pac. 797); *Little v. Van Syckle*, 115 Mich. 480 (73 N. W. 554).

Error is assigned as to the instructions given to the jury. They involve much the same principles as the rulings upon the evidence. The trial court charged the jury in part as follows:

"If you find that the parties stood upon an equality of footing, and that the defendant did not commit any fraud or falsely represent a material fact, or that the plaintiff was not able by the exercise of reasonable caution and vigilance to detect its falsity, and the statements of defendant were expressions of opinion as to value, then your verdict shall be for the defendant. * * Where a thing is peculiarly within the knowledge of one making a representation, and the one to whom the representation is made does not stand on an equal footing with the one making the representation, or does not have the same extent of knowledge upon the subject, he may rely upon the statements or representations made to him by the one having superior knowledge, but the law still insists that one must be cautious or vigilant in protecting himself and in looking for his own interest, and must not rely too much upon what others say or represent to him."

The instructions, as a whole, fully explained and properly submitted the questions at issue to the jury.

We find no error in the record; therefore the judgment of the lower court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE HARRIS CONCUR.

Argued October 25, reversed November 16, 1915.

KINGMAN COLONY IRR. CO. v. PAYNE.

(152 Pac. 891.)

Bills and Notes—Irrigation Project—Contract—Fraudulent Representations.

1. An irrigation corporation, formed by owners of arid lands, contracted with a contractor to construct an irrigation system in accordance with plans. The contractor agreed to receive payment in notes and mortgages given by the land owners. A land owner executed a note and mortgage on the representation that 55 acres of her 56.12 acres would be irrigated. Under a subsequent contract and plans, only 44 acres could be irrigated, and she refused to execute a new note and mortgage therefor. The corporation knew of the refusal before any work was done by the contractor who performed the subsequent contract. *Held*, that because of the representation, there could be no recovery on the note and mortgage at the suit of the corporation.

Contracts—Irrigation Project—Abandonment.

2. The maker, after the plan of the work had been changed without her consent, and she had refused a request to execute a new note and mortgage, to conform to the change, could assume an abandonment of the agreement as to her.

Contracts—Irrigation—Construction.

3. An irrigation corporation formed by owners of arid lands contracted with a contractor to construct an irrigation system in accordance with plans, indicating that 55 acres of a tract of 56.12 acres of an owner would be irrigated. The owner executed a note and mortgage for her share of the cost. Subsequently a new agreement between the corporations and the contractor was made, whereby only 44 acres of the tract could be irrigated. The owner refused to give a new note and mortgage pursuant to the new agreement. The contractor constructed the system in accordance with the new agreement. The corporation knew of the owner's refusal before any work was done. *Held*, that the system constructed under the new agreement was materially different from the system called for by the original agreement, and the note and mortgage were not enforceable at the suit of the corporation.

[As to right to set up total or partial failure of consideration as defense under general issue or denied in action on negotiable instrument, see note in *Ann. Cas.* 1913B, 318.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

The owners of certain arid lands in Malheur County caused the creation of the Kingman Colony Irrigation

Company, a private corporation, for the purpose of constructing and maintaining pumping plants and a system of ditches for the irrigation of accessible lands owned by the stockholders. Neither the plaintiff nor the land owners possessed sufficient available money with which to undertake the immediate installation of the irrigation plant, and for that reason, in August, 1911, the Kingman Colony Irrigation Company entered into a contract with James A. Green & Co., Inc., a corporation, whereby the latter agreed to construct the irrigation system. For the sake of brevity the plaintiff will be referred to as the Irrigation Company, and the James A. Green & Co., Inc., will be known as the contractor. The written agreement made in August, 1911, provides that the contractor shall construct the irrigation system in accordance with definite plans and specifications, which are made a part of the agreement; the writing also has blue-prints attached to it, showing the lands to be served by the proposed irrigation system, and clearly indicating the "approximate location of ditches, flumes and syphons." The contractor agreed to construct the plant for \$65,870, to be paid in notes and mortgages which were to be accompanied by certificates of the capital stock of the Irrigation Company. The scheme outlined by the contract required the Irrigation Company to go to the owners of the lands which were to be irrigated and cause those persons to give notes, secured by mortgages on the lands mentioned, the amount of each note being ascertained by figuring the acreage owned by the maker at the rate of \$25 per acre. The Irrigation Company agreed to issue to each mortgagor a certificate, representing a number of shares of the capital stock of the Irrigation Company "equal to the number of acres in the tract of land mortgaged." The notes and

mortgages, together with the certificates of stock as additional security, were to be placed in the hands of George W. Fletcher as trustee, who was to pay for the construction of the irrigation system by delivering to the contractor \$65,870 in notes, together with the mortgages and certificates of stock given as security for the respective notes; and any notes, mortgages and securities remaining after paying the contractor were to be turned over to the Irrigation Company.

The defendant owns a tract of land which originally embraced 60.81 acres; but 4.69 acres were appropriated for a railroad right of way, which enters the premises at a point east of the center of the north line, runs southerly and diagonally through the property, and so divides the land as to leave two strips, one on the west and one on the east side of the railroad, which aggregate 56.12 acres. On September 18, 1911, the defendant executed her promissory note for \$1,375, and she also executed notes to evidence the interest which was to become due on the principal note. The notes were secured by a mortgage on the defendant's land, which is described as "containing fifty-five (55) acres more or less." The notes and the mortgage were delivered to the Irrigation Company, and it in turn delivered them to George W. Fletcher as trustee.

The Irrigation Company and the contractor made a new agreement on November 8, 1911, for the reason that it had been ascertained that title had failed to some of the land embraced in the contract of August, 1911, and on that account it was not deemed practical to complete the irrigation system as originally planned. The new contract was in effect the same as the agreement dated August, 1911, except that in the former two pumping stations with their connecting ditches were eliminated and the contract price was reduced to

\$46,500. While it preserves the plan that had been devised for paying the contractor, the second agreement contains the following provisions, which do not appear in the first:

"It is understood and agreed, however, that in any case where all of each smallest legal subdivision of the land covered by any mortgage shall not be susceptible of irrigation from the irrigation system to be installed under this contract, in that event, the company may withdraw the same from the trustee and substitute other mortgages covering the exact acreage of such lands so susceptible of irrigation, after the same shall be determined from the definite location of the said canals."

—and, referring to the issuance of the certificates of capital stock, it is stipulated that the "certificates shall be issued by the Irrigation Company as soon as the contractor shall notify the company of the exact acreage in the various tracts of land susceptible of irrigation from the several canals aforesaid according to the definite location thereof."

After making the second contract the Irrigation Company represented to the defendant that it had been ascertained that only 44 acres of her land would be watered and, as substitutes for the notes and mortgage dated September 18, 1911, requested her to sign new notes for \$1,100 and to secure the paper by a mortgage on the 44 acres which were to be irrigated. The defendant declined to execute the proposed new notes and mortgage. In August, 1912, the contractor completed the irrigation system under the terms of the second contract, and was paid in the manner provided for by the agreement, and then the Irrigation Company received from George W. Fletcher, the trustee, the

notes and mortgage which had been signed by the defendant on September 18, 1911. At some time between November 8, 1911, when the second contract was made with the contractor, and July 15, 1912, certificates representing $44\frac{1}{2}$ shares of the capital stock of the Irrigation Company were issued for the benefit of the defendant, but she never accepted them. The complaint alleges that the stock is of the value of \$25 per share, although the certificates of stock, which are in evidence, recite the par value to be \$20 per share. The board of directors, in October, 1913, levied an assessment against the stock issued by the Irrigation Company to defray the expenses of operating the irrigating system, \$94.27 being the amount charged against the $44\frac{1}{2}$ shares which had been issued in the name of defendant.

The plaintiff commenced this suit on March 5, 1914, and seeks to recover on the notes dated September 18, 1911. It is alleged that $44\frac{1}{2}$, instead of 55, shares of stock were issued for defendant, and that \$262.50, the value of $10\frac{1}{2}$ shares not issued, should be credited on the principal of the note, leaving a balance of \$1,112.50, which is due, with interest, on account of the failure of defendant to comply with the provisions of the writing. The plaintiff demands a judgment for \$1,112.50, with interest, for \$94.27 to cover the assessment against the stock, and a decree foreclosing the mortgage on the land and shares of stock. The testimony was taken and reported by a referee. The decree was against the defendant, Retta Payne, who appealed.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. William H. Brooke* and *Mr. Ralph W. Swagler*.

For respondent there was a brief with oral arguments by *Mr. John W. McCulloch* and *Mr. Wells W. Wood*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The decision of this controversy depends largely upon the conversation and agreement of the parties at the time the defendant signed the notes and mortgage on September 18, 1911. The Irrigation Company takes the position that the transaction was preliminary, and that the parties agreed that the defendant would execute new notes and another mortgage in lieu of the ones delivered on September 18th if it should be ascertained, after making a final survey, that the irrigable acreage amounted to less than 55 acres. The defendant asserts that she understood that the business was completed when she signed and delivered the papers on September 18th; that she executed the instruments upon representations made by the Irrigation Company, and with the understanding that 55 acres of her land would be irrigated from the ditches as they were mapped upon the blue-prints; and that she was warranted in refusing to sign the new notes and mortgage. She also argues that the notes and mortgage sued upon are ineffective because the irrigation system was not substantially completed as originally planned, and for the further reason that both the plaintiff and defendant abandoned all agreements appertaining to the land owned by the latter. A. E. Wade conducted the negotiations for the Irrigation Company. The defendant had purchased the land in 1910 through Wade, who had acted as the agent of the owner; and, when discussing the irrigation pro-

ject in September, 1911, the defendant knew that he was familiar with the premises because she had examined the land in company with him in 1910, when she purchased the property. An action for the condemnation of the railroad right of way had been terminated only a few days before September 18, 1911, and for that reason the number of acres was fresh in the mind of defendant. Retta Payne testified that she knew that a small piece in the northwest corner could not be irrigated, and that Wade told her that it amounted to about half an acre. The defendant in not uncertain terms repeatedly states that it was represented to her that 55 acres of the land would be watered. She is corroborated by the testimony of her son, who says that Wade told him:

“There would be something in the neighborhood of an acre waste, and that the balance of it would be irrigated.”

The attorney who advised with Mrs. Payne and as a notary public took the acknowledgment of the mortgage confirms the version given by defendant because it appears from his testimony that:

“During some of those conversations Mr. Wade—I don’t remember the details, just exactly how he stated it, but he said something to the effect that there was to be 55 acres of her land irrigated at that time. We had, of course, discussed the acreage and the situation with reference to the railroad, and something was said with reference to the northwest corner, a part of an acre, or something of that kind, that would not be irrigated, and it was estimated that 55 acres would cover approximately the amount of land which would be irrigated.”

Although Wade testified that he did not represent that the system which it was proposed to construct

"would cover all her land"—nor does the defendant claim that he so represented to her—nevertheless, he could not positively say that he had said anything to her "about afterward changing this mortgage and her notes in any way"; and the witness further stated: "I believe that I explained that matter to her; I couldn't say absolutely." It is not asserted by anyone that the representations made by plaintiff involved the element of fraud. The inquiry is directed only to what was said, making it necessary to discover whether the plaintiff stated that the system would water 55 acres. The position taken by the defendant is supported by the clear preponderance of the evidence, especially when it is remembered that she knew that she owned 56.12 acres of land and the mortgage only called for 55 acres, as this circumstance of itself indicates that there was some reason for naming less than the entire acreage owned by the mortgagor.

2. The defendant further contends that the litigating parties considered that their contract had been abandoned. The evidence does not definitely disclose the date when the Irrigation Company presented the new notes and mortgage for the signature of defendant, although it was at some time after November 8, 1911, when the second agreement was made with the contractor; and it occurred before the contractor had begun work, because actual construction commenced "in April, 1st of April—it might have been earlier than that." The defendant testified that she first learned of the second agreement with the contractor when the representative of the Irrigation Company presented the proposed new notes and mortgage, and "stated to me that they wouldn't be able to irrigate so many acres as they had said, 55 acres, and that he

wanted me to fill out these, make new arrangements with him."

She wished to inspect the second agreement with the contractor, and a copy was sent to her. After examining the writing and discovering that the system would accommodate a smaller area of her land than at first planned, she determined not to sign the notes and mortgage. Interviews with representatives of the Irrigation Company ended by the defendant saying that she would not execute the new instruments, and the plaintiff was made aware of her intention before construction work commenced. Under these circumstances the defendant had a right to assume that the Irrigation Company had abandoned the agreement with her, because she did not again hear from the plaintiff until the expiration of two years, although in the meantime the irrigation system had been constructed, was being operated, and an assessment against the stock had been levied in October, 1913.

3. It is the contention of the Irrigation Company that the change in the agreement with the contractor did not affect the lands owned by defendant, and that for all practical purposes the Payne land is served by ditches which were constructed as originally planned. One ditch is located west of the railroad right of way, and cuts across the northwest corner of the land so as to leave a triangular piece of about 12 acres to the west of this ditch. There is testimony in behalf of the plaintiff to the effect that one ditch comes to the south line of the premises at a point east of the railroad. It is also claimed that ditch No. 5 is constructed almost to the north line of the Payne land, notwithstanding the fact that witnesses for the defendant, one of them being a civil engineer who went upon the land for the express purpose of ascertaining and mapping the exact

conditions, were positive in their declarations that they could not see any such ditch. The most that plaintiff can claim for these three ditches is that the one west of the railroad will water $37\frac{1}{2}$ acres, a portion of which is east of the railroad; that the ditch coming from the south will irrigate 2 acres, and the one coming from the north will serve 5 acres. It is conceded that the ditch running across the northwest corner is on a line the elevation of which is above all the land lying east of that ditch; but it also appears that it would be very expensive, and therefore not practical, to carry the water over or under the right of way for use on the east side of the railroad. The plan exhibited to the defendant when she signed the notes and mortgage indicated that ditch No. 5 would enter the north side of the Payne land and be extended almost to the south line, and that from this ditch the defendant could irrigate the land east of the right of way without being compelled to adopt an expensive system of syphons for conducting the water from the ditch running across the northwest corner. The specifications remove all doubts that may be raised from a mere inspection of the blue-prints, and demonstrate that according to the original contract ditch No. 5 was to be extended through the land of defendant and almost to the south line, for it is specified that this ditch shall be "one mile" in length; and it appears that if the ditch terminated at the north line it would be only about five-eighths of a mile long. The right to water 55 acres of her land with a system which was defined and made certain and was to be furnished by plaintiff constituted the consideration for the notes and mortgage signed by defendant. The system constructed is materially different from the one promised, and that material difference affects the lands of

defendant to a marked degree; and, furthermore, the plant as now installed, even by the employment of expensive and impracticable methods, will serve only four-fifths of the acreage agreed upon when the notes and mortgage were signed on September 18, 1911: *Foeller v. Heintz*, 137 Wis. 169 (118 N. W. 543, 24 L. R. A. (N. S.) 327).

The Irrigation Company had ample notice, before commencing actual construction, that the defendant refused to be bound by the second agreement made with the contractor, and it was not warranted in proceeding with the second contract in despite of the objection made by defendant, so as to make her liable for something she not only did not agree to, but which she expressly repudiated in advance. The plaintiff refused to proceed with the first agreement, while the defendant declined to enter into a new one. The contract actually made was terminated by abandonment, and no new agreement was adopted as a substitute: *Davis v. Bronson*, 2 N. D. 300 (50 N. W. 836, 33 Am. St. Rep. 783, 16 L. R. A. 655). The notes and mortgage signed by the defendant and mentioned in the complaint are canceled.

The decree of the trial court is reversed.

REVERSED.

Argued July 7, reversed July 30, former opinion modified on rehearing November 23, 1915.

YEATON v. BARNHART.

(150 Pac. 742; 152 Pac. 1192.)

Executors and Administrators—Sale of Property—Collateral Attack.

1. Defenses, interposed in an action by a purchaser at an administration sale to pay debts of the estate to enjoin the sale of real property and to quiet the title thereto, which attack the power of the court to order the sale, are equivalent to collateral attacks on the order of the County Court directing the sale and are unavailing, unless the order assailed was necessarily void.

Executors and Administrators—Sale of Land—Jurisdiction of County Court.

2. Under Article VII, Section 1, of the Constitution, vesting the County Court, among others, with general jurisdiction to be defined and regulated by law, Section 12, giving such court jurisdiction pertaining to Probate Courts, and Section 13, authorizing the county judge to grant preliminary injunctions and such other writs as the legislature may authorize him to grant, and Section 936, subdivision 5, L. O. L., giving it exclusive probate jurisdiction in the first instance to order the sale and disposal of the property of decedents, the County Court is a court of general and superior jurisdiction in probate matters, and is vested with limited judicial functions in the common-law sense, which it may exercise in all prescribed matters beyond its special statutory authority in the transaction of county business, and, on petition for the sale of the realty of a decedent based on an allegation of facts requiring an exercise of its power, it could determine its jurisdiction, which determination was conclusive, unless reversed on appeal or avoided for fraud in a direct proceeding.

Executors and Administrators—Sale of Realty—Sufficiency of Petition.

3. Under Section 1135, L. O. L., declaring that the court in probate proceedings exercises its powers by means of an affidavit or the verified petition or statement of a party, and Section 1253, providing that a petition for the sale of the real property of a decedent shall state the amount of the sales of personal property, the condition and probable value of the different lots of land, the amount and nature of any liens thereon, and the names, ages and residences of the heirs of the deceased, a petition by an administratrix, duly verified, showing a necessity for the sale, particularly describing the real property involved, in which the errors or defects, in some respect material, might have been avoided on appeal, but where an appeal had become barred and the order had become the foundation of title to property, was sufficient.

Judgment—Lien—Interest of Heirs.

4. Where a daughter of an intestate inherited his real property under Section 7348, L. O. L., subject to her mother's dower under Section 7286, and to the indebtedness of the estate and the

expense of administration, any judgment rendered against the daughter and docketed prior to the day when she, as administratrix applied for leave to sell the realty to pay debts of the intestate became a lien on her interest therein.

Judgment—Docketing Justice's Judgment—Lien.

5. Section 2442, L. O. L., provides that a judgment of a Justice's Court for the recovery of money does not become a lien upon real property until a transcript thereof has been filed with the county clerk. Section 2449 provides that judgment duly docketed in the Circuit Court may be enforced as a judgment of that court. Section 771 requires the justice certifying the transcript to state that the copy had been compared by him and is a correct transcript of the judgment. Section 201 provides that a judgment of a Circuit Court must be entered by the clerk within the day it is rendered, and Section 205 requires the clerk immediately after recording the judgment to make a memorandum thereof in the lien docket. *Held*, that judgments against the interest in real property inherited by defendant from her father, not filed as required by such provisions before her application, as administratrix, to sell realty of the estate to pay debts, were not liens on her property, that judgments the transcripts whereof were not certified as required by statute created no liens thereon, but that a judgment duly docketed before such application became a lien thereon.

[As to docketing of judgment by justice of the peace, see note in 40 Am. Dec. 386.]

Evidence—Presumptions—Judicial Actions.

6. It is presumed that official duty has been regularly performed.

Executors and Administrators—Administrator's Sale—Effect on Dower.

7. A sale of real property by an administratrix to pay the debts of the deceased did not divest the widow of her right of dower in the premises.

Executors and Administrators—Sale of Property—Interest of Heirs—Judgment Against Heirs.

8. An administrator's sale of the real property of an intestate to pay his indebtedness deprives the heirs of their estate in the premises, since their rights are inferior to the demands of the creditors, and necessarily destroy the lien upon such land of any judgment rendered against the heir; but, in case of such sale, the judgment creditor of an heir is not without remedy, as when the distributive share of the heir has been ascertained and ordered by the court to be paid, and such proportionate part of the estate is no longer in the custody of the law, he may thereupon garnish it in the hands of the administrator.

ON PETITION FOR REHEARING.

Executors and Administrators—Sale of Real Estate—Collateral Attack.

9. Where an administrator's petition for the sale of real estate was sufficient to invoke an exercise of jurisdiction, an order based thereon could not be set aside on collateral attack, though the application and subsequent proceedings might have been vacated on direct appeal.

Executors and Administrators—Sale of Property—Interest of Creditors of Heirs.

10. A creditor of an heir of an intestate who has not secured any lien on the heir's interest in real estate, cannot assert any interest therein as against a purchaser at an administrator's sale.

Executors and Administrators—Sale of Property—Interest of Creditors of Heirs.

11. A creditor of an heir of an intestate who has acquired a lien against the heir's interest in real estate, and who has actual notice of an application and proceedings for the sale of the land of the intestate or who knows facts such as would put a person of ordinary prudence on inquiry, is guilty of laches precluding any assertion of his judgment lien against the interest in the real estate as against a purchaser at the administrator's sale, where he fails to interpose objections in the proceedings.

Pleading—Complaint—Demurrer—Discretion of Trial Court.

12. Whether a defendant demurring to the complaint shall be permitted to answer over rests in the discretion of the trial court, and, if leave is granted, an answer may be filed controverting the allegations of the complaint.

Executors and Administrators—Sale of Property—Rights of Lien Claimants of Heirs.

13. Where a creditor of an heir of an intestate had acquired a lien against the heir's interest in the land of the intestate, and he had no actual notice of proceedings for the sale of the land by the administrator until after the sale was completed, his lien must be decreed against the interest the heir had in the land prior to the sale.

From Yamhill: WEBSTER HOLMES, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit to enjoin the sale of real property and to quiet the title thereto. The material averments of the complaint, as far as involved herein, are to the effect: That the plaintiffs, Elias M. Yeaton and Alice E. Yeaton, are husband and wife, and the defendant W. G. Henderson is the duly elected, qualified, and acting sheriff of Yamhill County, Oregon. That Stephen Brynjolfson died intestate in that county, November 13, 1909, seised in fee simple of lot 9 in block 2, and lots 7, 8 and 9 in block 3, of Foster's Addition to the town of Sheridan in that county, and leav-

ing as his only heirs the defendants Lena Yeaton, a daughter 26 years old, and Helga Brynjolfson, his widow. That on November 19, 1909, the County Court of Yamhill County duly appointed Lena Yeaton administratrix of the decedent's estate, the personal property of which was of the value of \$50 and was wholly exhausted in paying a part of the indebtedness which amounted to \$300. That on March 20, 1913, the administratrix applied to the County Court for leave to sell the real property of the estate to pay the indebtedness thereof and the costs and expenses of the administration. That a citation was thereupon issued to the widow and personally served upon her at Portland, Oregon, where she was then residing, requiring her to appear at the courtroom in Yamhill County on April 5, 1913, and show cause why the petition should not be granted, but she did not appear or file any objections, and at the time last stated an order was made directing a sale of the real property of the estate for the purposes specified. That, complying with such command, the administratrix published notice of the sale in the "Sheridan Sun," a weekly newspaper, printed in that county, for five successive weeks, beginning April 10, 1913, and ending May 8th of that year, and at the time designated she sold the premises to the plaintiffs for \$1,200; that being the highest sum offered therefor. That the sale was duly confirmed, May 27, 1913, whereupon the administratrix executed to the purchasers a deed of the premises, receiving the consideration therefor. That the plaintiffs instituted a suit in the Circuit Court of the State of Oregon for Yamhill County, against Andrew Pullen and others, to quiet the title to such real property, and the defendant C. L. Barnhart appearing asserted a lien upon the land by reason of a judgment he had secured in

that court, September 21, 1911, against the defendant Lena Yeaton and her husband for \$291.80, whereupon that suit of the plaintiffs was dismissed without prejudice. That judgments were obtained against the defendant Lena Yeaton and her husband in a Justice's Court of Polk County, Oregon, by the defendants N. Selig, June 30, 1911, for \$103.98; Ethel Chambers, August 15, 1911, for \$35; and Ed Rich, August 25, 1911, for \$110.79—and the costs and disbursements in each action, transcripts of which judgments were filed and docketed in Polk County, October 6, 1913, and in Yamhill County, October 11th of that year. That each of such judgment creditors asserts some interest in or claims a lien upon the real property hereinbefore described. That from the purchase price so paid by the plaintiffs for the real property there was disbursed by the administratrix \$440.19 in discharging the indebtedness of the estate, giving the items thereof. That, the administratrix having filed her final account, notice thereof was published, requiring all persons interested to file objections thereto prior to August 16, 1913, at 1 o'clock P. M.; but, none having been filed, the account was allowed in whole on August 20, 1913, and the estate ordered to be apportioned, whereupon the defendants Lena Yeaton and Helga Brynjolfson each received and retained one half of \$759.81, the remainder of the purchase price, as her distributive share. That each of the defendants had notice and knowledge of all the proceedings in the administration of the decedent's estate referred to herein, but neither of them made any objections to the settlement of the final account or undertook to secure any part of the sum ascertained to be due Lena Yeaton, by reason whereof each is and ought to be estopped now to assert or claim any lien upon the real property adverse to the plain-

tiffs. That on September 10, 1913, the defendant Barnhart caused to be issued on his judgment against the defendant Lena Yeaton and her husband an execution which was delivered to the defendant Henderson, who was directed to levy upon such real property, and unless he is restrained will obey the command, thereby clouding the title to the premises. That the plaintiffs had no notice or knowledge of any defect in the sale of the land or of any claim to or lien thereon, but purchased in good faith the premises of which they ever since have been in the possession, and that they have no plain, speedy or adequate remedy at law.

There are attached and made parts of the complaint copies of nearly all the proceedings in the administration of the decedent's estate, from the filing of the petition to sell the real property, and also of the judgments rendered in the Justice's Court, including transcripts thereof which have been filed for the purpose of creating liens on the premises. The defendants Selig, Rich and Ethel Chambers jointly demurred to the complaint, on the ground *inter alia* that it did not state facts sufficient to constitute a cause of suit, and the defendants Barnhart and Henderson also jointly demurred to the initiatory pleadings on the same basis. The defendants Lena Yeaton and Helga Brynjolfson did not appear in any manner. The demurrers were sustained, the temporary injunctions which had been granted were dissolved, and the suit dismissed, from which decree the plaintiffs appeal.

REVERSED. MODIFIED ON REHEARING.

For appellants there was a brief over the names of Mr. Oscar Hayter and Messrs. Simpson & Lewis, with an oral argument by Mr. Hayter.

For respondents there was a brief with oral arguments by *Mr. W. O. Sims* and *Mr. Roswell L. Conner*.

Opinion by MR. CHIEF JUSTICE MOORE.

The petition for the sale of the real property did not state the amount of the sales of personal property, the condition and probable value of the different lots of land, the amount and nature of any liens thereon, nor the names, ages and residences of the heirs of the deceased, as required by the statute: Section 1253, L. O. L. In *Wright & Jones v. Edwards*, 10 Or. 298, 307, a petition for leave to sell land belonging to a decedent's estate did not state the amount of sales of personal property, the charges, expenses or claims remaining unsatisfied, nor describe the real property to be sold, or state its condition or value, nor was the application verified by the administrator or anyone on his behalf, and it was held that the County Court did not secure jurisdiction of the subject matter, and, in ordering a sale of the premises, acted without authority, in consequence of which the proceedings were a nullity and conferred no right or title in or to the real property. In deciding that case, Mr. Justice LORD, speaking for the court, says:

"Where there is matter of substance upon which jurisdiction can hinge, mere errors or defects, although material in some respects, but which might have been avoided on appeal, cannot avail to condemn a judicial proceeding when, by lapse of time, an appeal is barred, which has become the foundation of title to property."

The plaintiff's counsel, relying on such excerpt to establish the rule governing this case, insists that, notwithstanding the failure of the application for leave to sell the real property to aver all the facts required

by the statute, the petition stated sufficient to invoke an exercise of jurisdiction by the County Court to authorize a sale of the land in order to discharge the indebtedness of the estate and to pay the expenses of the administration, and, this being so, an error was committed in dismissing the suit.

1. The answers interposed herein are equivalent to collateral attacks on the order of the County Court, directing a sale of the real property, and to render those defenses availing the order assailed must necessarily be void: Van Fleet, Col. Attack, § 3.

2. It becomes important therefore to consider the nature of that tribunal, and the character of the proceedings undertaken to secure a sale of the land. The organic law of the state declares:

“The judicial power of the state shall be vested in a Supreme Court, Circuit Courts, and County Courts, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law, in accordance with this Constitution”: Article VII, Section 1, of the Constitution of Oregon.

“The County Court shall have the jurisdiction pertaining to Probate Courts, and boards of county commissioners, and such other powers and duties, and such civil jurisdiction not exceeding the amount or value of five hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law”: Id., § 12.

“The county judge may grant preliminary injunctions, and such other writs as the legislative assembly may authorize him to grant, returnable to the Circuit Court, or otherwise, as may be provided by law; and may hear and decide questions arising upon *habeas corpus*; provided, such decision be not against the * * proceedings of a court or judge of equal or higher jurisdiction”: Id., § 13.

Section 1 of Article VII of the fundamental law was amended November 8, 1910 (see Laws 1911, p. 7), but does not alter the clauses quoted until future legislation is had upon the subject, and, no statute for the entire state having been enacted in any of these particulars, these original provisions of the Constitution remain intact. Pursuant to a grant of power by the organic act, a statute was enacted which provides:

“The County Court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is: * * (Subdivision 5) To order the sale and disposal of the real and personal property of deceased persons”: Section 936, L. O. L.

In construing these clauses of the fundamental law and of the statutes passed in conformity therewith, it has been frequently held that in probate matters the County Courts in Oregon are tribunals of general and superior jurisdiction: *Russell v. Lewis*, 3 Or. 380; *Tustin v. Gaunt*, 4 Or. 305; *Monastes v. Catlin*, 6 Or. 119; *Slate's Estate*, 40 Or. 349, (68 Pac. 399); *Smith v. Whiting*, 55 Or. 393 (106 Pac. 791); *Hillman v. Young*, 64 Or. 73 (127 Pac. 793, 129 Pac. 124). It will thus be seen that the organic law invests the County Court with jurisdiction in probate matters and confers upon that tribunal limited judicial functions in the common-law sense, which power the court can exercise in all prescribed matters, beyond its special authority which is restricted to a performance of specific statutory duties pertaining to the transaction of county business. The County Court, having ordered a sale of the premises, necessarily decided that jurisdiction of the subject matter over which its authority extends had been secured in a proceeding based upon a proper allegation of the facts requiring an exercise of its

power; and, it being thus competent to determine whether or not the facts set forth in the petition to sell the real property to pay the debts incurred by the deceased were adequate, the determination is conclusive against all the world, unless reversed on appeal or avoided for fraud in a direct proceeding: Woerner, Am. Law Admr. (2 ed.), § 145.

3. In the petition for leave to sell the real property of a decedent's estate it is the allegation of indebtedness that discloses the necessity for the sale and affords the basis upon which the order to that effect must necessarily be predicated, the description of the premises which supplies the object upon which the order of sale is to operate, and the verification of the petition that authorizes the County Court to determine the truth of the averments. In *Wright & Jones v. Edwards*, 10 Or. 298, 307, it will be kept in mind that the application for leave to sell did not state the indebtedness, nor describe the real property desired to be sold, nor was the petition verified.

The statute relating to probate proceedings, as far as material herein, reads:

"The court exercises its powers by means of * * an affidavit or the verified petition or statement of a party": Section 1135, L. O. L.

In *Rutenic v. Hamaker*, 40 Or. 444, 451 (67 Pac. 196, 199), it is said:

"The mode of proceeding in the administration of estates is in the nature of a suit in equity, as distinguished from an action at law; the County Court exercising its power by means of a citation to the party, and securing jurisdiction of the subject matter by means of a verified petition, enforcing its determination by orders and decrees."

An application for leave to sell real property is in the nature of an independent proceeding, in which the jurisdiction of the County Court to grant the relief desired must depend upon the sufficiency of the petition which, in order to defeat a direct attack, must substantially comply with the requirements of the statute. That court being a tribunal having general jurisdiction in probate matters, it would seem necessarily to follow that, if the application for leave to sell were lost, the order directing the sale would afford the requisite presumption that the petition contained the necessary averments. If it affirmatively appear from an inspection of a petition that it failed to show any necessity for the sale, or to describe the real property desired to be disposed of, jurisdiction of the subject matter would not thereby be secured and the order of sale must be void and vulnerable on collateral attack, since the proceedings to sell the land were probably in the nature of an application for an exercise of a special statutory power: *Wright & Jones v. Edwards*, 10 Or. 298, 307; *In re Noon's Estate*, 49 Or. 286 (88 Pac. 673, 90 Pac. 673).

The rule thus established is considered controlling as far as it is applicable to the facts there involved. It is believed, however, that such legal principle should not be extended, and where, as in the case at bar, the petition shows a necessity for the sale, particularly describes the real property involved, and is duly verified, there are matters of substance alleged upon which jurisdiction can hinge, and mere errors and defects, although material in some respects, and which might have been avoided on appeal, cannot avail to condemn the proceeding when, by the lapse of time, an appeal has become barred, and the order appropriate to the foundation of title to property: *Walker v. Goldsmith*,

14 Or. 125, 143 (12 Pac. 537); *Lawrey v. Sterling*, 41 Or. 518 (69 Pac. 460). See, also, *Van Fleet*, Col. Attack, §§ 815-829.

4. Stephen Brynjolfson having died intestate November 13, 1909, his daughter, the defendant Lena Yeaton, inherited the real property described herein, subject, however, to her mother's dower estate in the premises and to the indebtedness of the estate and the expense of administering thereon: Sections 7286, 7348, L. O. L. Any judgment rendered against Mrs. Yeaton that was properly docketed prior to March 20, 1913, when the application for leave to sell the land was made, became a lien upon her interest in the premises.

5. A judgment given by a Justice's Court for the recovery of money does not become a lien upon real property until a proper transcript thereof has been filed with the county clerk of the county where such judgment was rendered: Section 2442, L. O. L. When a judgment thus given has been duly docketed in the Circuit Court of the proper county, it may be enforced as a judgment of that court: *Id.*, § 2449. In the judgments obtained in the Justice's Court of Polk County against Lena Yeaton and her husband by the defendants N. Selig, Ethel Chambers and Ed Rich, no transcript of either determination was filed with the county clerk of that county until October 6, 1913, nor in Yamhill County, where the real property is situated, until five days thereafter. Neither of these judgments was a lien upon the premises when on March 20, 1913, the administratrix filed her duly verified petition for leave to sell the land, and hence no necessity existed to make any mention of either in the petition. Copies of the transcript of such judgments were made parts of the complaint, having attached to each an attestation as follows:

"I hereby certify I am the duly elected, acting and qualified justice of the peace for above-named justice of the peace district for Polk County, Oregon; that the foregoing is a true transcript of the record of the above-entitled action, as the same appears in my docket.

"[Signed] J. H. FLOWER,
"Justice of the Peace,
"4th Dist. Polk County, Oregon."

As this certificate did not state that the copy had been compared by the justice of the peace with the original, and that it was a correct transcript therefrom and of the whole or some specified part thereof, as required by statute (Section 771, L. O. L.), no lien was created by the docket entry made in Yamhill County as to either of those judgments: *Evans v. Marvin*, 76 Or. 540 (148 Pac. 1119).

6. The complaint does not state when the judgment secured by the defendant Barnhart against Lena Yeaton and her husband in the Circuit Court of Yamhill County, September 21, 1911, became a lien upon the real property hereinbefore described. A judgment given by a Circuit Court must be entered by the clerk within the day it is rendered: Section 201, L. O. L. Immediately after recording the judgment, the clerk is required to make a memorandum thereof in the lien docket: *Id.*, § 205. Invoking the presumption that official duty has been regularly performed, it must be assumed that Barnhart's judgment was duly docketed and became a lien upon the premises prior to March 20, 1913, when the administratrix applied for leave to sell the land.

7. The sale of the real property by the administratrix to pay the debts of the deceased did not divest the widow of her right of dower in the premises: *House v. Fowle*, 22 Or. 303 (29 Pac. 890); *Whiteaker v. Belt*,

25 Or. 490 (36 Pac. 534); *In re Smith's Estate*, 43 Or. 595 (73 Pac. 336, 75 Pac. 133).

"It is evident that the purchasers at an administrator's sale," says a text-writer, "can acquire only that interest in the property sold which the deceased owned at the time of his death. The rights of others, holding by a title superior or equal to that of the deceased debtor, cannot be affected by the proceedings in the Probate Court": 2 Woerner, *Am. Law of Admr.* (2 ed.), § 482.

8. A sale by an administrator of the real property of an intestate to pay his indebtedness deprives the heirs of their estate in the premises, since their rights are inferior to the demands of the creditors: *Id.*, § 471. As the right of an heir to a share of his ancestor's real property is extinguished by an administrator's sale of the premises to pay the indebtedness of the decedent, so, too, such sale when properly petitioned for and regularly conducted must necessarily destroy the lien upon such land of any judgment rendered against the heir: *Nichols v. Lee*, 16 Colo. 147 (26 Pac. 157). In case of a sale under such circumstances, the judgment creditor of an heir is not remediless; for, when the distributive share of the heir has been ascertained and ordered by the court to be paid, such proportionate part of the estate is no longer in the custody of the law, and may thereupon be garnished in the hands of the administrator or executor: *Harrington v. La Rocque*, 13 Or. 344 (10 Pac. 498). The defendants N. Selig, Ethel Chambers and Ed Rich made no effort to secure by garnishment any part of the distributive share ascertained to be due Lena Yeaton and ordered by the County Court to be paid to her, and since neither of these defendants had a lien upon the real property, he is not in a position to question the pro-

ceedings of that court whereby a sale of the premises was ordered or conducted.

When the petition for leave to sell the real property was filed, the judgment obtained by the defendant Barnhart against the defendant Lena Yeaton was a lien on her inherited interest in the premises. A sale of that interest to pay her father's indebtedness extinguished the lien, notwithstanding which the holder thereof could have enforced his demand against her distributive share of the estate, which right he did not elect to exercise. As the proceedings undertaken to sell the real property were not void, his remedy is now limited to a recovery against Mrs. Yeaton and her husband, and he has no legal claim against the plaintiff's premises.

The decree will therefore be reversed and one entered here quieting the plaintiff's title to the real property hereinbefore described; there apparently being no controversy as to the facts.

REVERSED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Modified November 23, 1915.

ON PETITION FOR REHEARING.

(152 Pac. 1192.)

Mr. Oscar Hayter, for the petition.

Mr. W. O. Sims and *Mr. Roswell L. Conner*, *contra*.

Department 1. Opinion by MR. CHIEF JUSTICE MOORE.

It is contended in a petition for a rehearing that Section 1253, L. O. L., declares what facts an administrator or executor must set forth in an application to

a County Court for leave to sell any of the real property of a decedent's estate, and, this being so, the exclusion of any of these prerequisites and a determination that an exercise of the right to grant an order to sell such land could be predicated alone upon a verified petition which alleged only a mere indebtedness incurred by the deceased and described the premises desired to be sold, as stated in the former opinion, are erroneous.

No departure from a literal observance of all the requirements of the statute referred to in a direct attack upon the proceedings was sanctioned or even suggested. The holding complained of was based upon facts which must be stated in such petition, so that the order made thereon would not be set aside as void on a collateral attack. A text-writer, discussing this subject, remarks:

“Even if the sale should be held good as against a collateral attack—and it is distressingly uncertain to what extent the trial, and even appellate courts will go in that direction—yet many acts of commission or omission which will not be allowed to invalidate the transaction in a collateral investigation may in a direct proceeding subject the administrator to serious liability, the estate to loss and delay, and all parties concerned to vexatious and oftentimes ruinous litigation”: Woerner, Admr. (2 ed.), § 463.

This author, commenting upon what the petition for a sale of real property must show, observes:

“Unless it appear from its averments that debts which the decedent had contracted during his lifetime are still unpaid, and that there are not personal assets sufficient to discharge them, but real estate which is liable for their payment, the court will have no power to order or license such sale, and therefore any order so made, and any sale thereunder, must be void”: Id., § 468.

9. The petition for the sale of the land described herein, a copy of which is included in the transcript, conforms to requirements mentioned in the former opinion, and was sufficient to invoke an exercise of jurisdiction. The order based thereon is not void, and hence cannot be set aside upon a collateral attack, though the application for leave to sell the real property and all subsequent proceedings might have been vacated if an appeal therefrom had been regularly taken.

10. The defendants N. Selig, Ed Rich and Ethel Chambers, never having secured any liens upon Lena Yeaton's interest in the land, by reason of the defective certificates to their respective judgments, can legally have no further interest in this suit; and a decree should be entered enjoining each, and his successors and assigns, from claiming or asserting any interest in or right to the premises or any part thereof by reason of either of the judgments so rendered in the Justice's Court.

11. It is argued that the defendant Barnhart never had an opportunity to make a direct attack upon the proceedings instituted in the County Court to sell the real property, and could not have appealed from any order or decree rendered therein. This defendant could have gone into the County Court, set forth his judgment lien against the interest of Lena Yeaton in the real property, thereby becoming a party to the proceedings, so that he could have obtained the sum due her as an heir or sufficient thereof to satisfy his debt, and, if such relief were not awarded him, he could have appealed. He had no constructive notice of such proceedings having been instituted to sell the land, because his judgment lien was not set forth or referred to in the petition for a sale of the premises. If he had

actual notice of that application and of the subsequent proceedings based thereon, as alleged in the complaint and confessed by the demurrer, or knew of such facts relating thereto as would put a person of ordinary prudence upon inquiry, and from such investigation could have interposed objections to the petition, and the order of sale, or have claimed a share of the proceeds and failed or refused to do so, his laches preclude any assertion of his judgment lien against such interest in the real property.

12. The defendant Barnhart had his day in court when he demurred to the complaint, thereby interposing an answer which raised a question of law. Whether or not he should be permitted to answer will depend upon the discretion of the trial court to which the cause will be remanded. If such leave be granted, an answer may be filed controverting such actual notice, and if it be found that he was aware of the proceedings undertaken to sell the land, and made no effort to assert his rights, his interest in the premises by reason of the judgment lien should be barred.

13. If, however, the court should find he had no actual notice of these proceedings until after they were concluded, so that he could not have asserted and protected his rights, the lien of his judgment should be decreed against the interest Lena Yeaton had in the premises prior to the sale.

The former opinion will therefore be modified and the cause sent back for such further proceedings, relating to the defendant Barnhart, as may be necessary not inconsistent herewith.

REVERSED. MODIFIED ON REHEARING.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS CONCUR.

Argued September 9, affirmed September 21, rehearing denied November 23, 1915.

SCHOOL DISTRICT NO. 35 v. HOLDEN.*

(151 Pac. 702.)

Schools and School Districts—Boundaries—Change of.

1. Article IV, Section 1a, of the Constitution, declares that the initiative and referendum powers are reserved to the legal voters of every municipality and district, in and for their several municipalities and districts. Article XI, Section 2, declares that corporations may be formed under general laws, and that no charter of any municipality, city, or town shall be amended or repealed by the legislature, but that the legal voters may enact or amend their charters. Section 4021, L. O. L., provides for changing the boundary of school districts by the district boundary board. This statute was in force prior to the adoption of Article XI, Section 2, of the Constitution. *Held* that, as the statute which was part of the general law formed the charter, if there was one, of the school district, changes might be made by the district boundary board according to the statute without submitting the matter to the electorate; the change not being made by the legislative assembly.

From Tillamook: WEBSTER HOLMES, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

In this suit School District No. 35 of Tillamook County, complaining and styling itself a municipal corporation, describes its own boundaries, as well as those of two other school districts of that county, and alleges the official station of the defendant, J. C. Holden to be that of county clerk, and the other defendants county judge, commissioners and county school superintendent, composing the district boundary board on March 8, 1912. It further charges that this board, in pursuance of a petition and regular proceedings under Section 4021, L. O. L., took from the plaintiff district part of its territory and gave it to the other districts mentioned; the history of the pro-

*Generally as to matters relating to the initiative and referendum, see notes in 11 L. E. A. (N. S.) 1092; 33 L. E. A. (N. S.) 969; 60 L. E. A. (N. S.) 196.

ceeding being set out in detail in the complaint. A demurrer to the primary pleading was sustained, and the suit dismissed. Of this result, the plaintiff complains on appeal to this court.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway*.

For respondents there was a brief over the names of *Mr. H. T. Botts* and *Mr. M. J. Gersoni*, with an oral argument by *Mr. Botts*.

MR. JUSTICE BURNETT delivered the opinion of the court.

Section 4021, L. O. L., ordains a procedure to be observed in changing the boundaries of school districts, the details of which it is not necessary to rehearse, because no question was made at the argument that they were not observed in this instance. The sole contention presented by the plaintiff is that the district boundary board, deriving its powers, as it does, from the legislative assembly, has no authority to change the boundaries of a school district, because that is tantamount to the amendment of the charter of a municipality within the inhibition of Section 2, Article XI, of the state Constitution. Stated otherwise, the plaintiff maintains that a change in the boundaries of the plaintiff district can only be accomplished through the initiative power described in Section 1a, Article IV, and Section 2, Article XI, of the state Constitution. These portions of the organic law, so far as applicable to the question in hand, read thus:

Section 1a, Article IV:

“ * * The initiative and referendum powers reserved to the people by this Constitution are hereby

further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. * * ”

Section 2, Article XI:

“Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon.”

Speaking of school districts, Mr. Justice MOORE, in *School District No. 48 v. School District No. 115*, 60 Or. 38 (118 Pac. 169), said:

“These divisions are vested with certain powers, which they can employ in the particular manner prescribed. As agencies of the state, they have no vested right to the property which they may acquire, but hold it in trust for the general public, and such *quasi* corporations may be changed at the will of the power creating them. * * A school district sustains no higher relations to the state than a county occupies, and the rule is settled that the legislative department may divide counties at pleasure, apportioning the assets and burdens in such manner as may be deemed just and reasonable.”

Writing about the excerpts from the organic act above mentioned in *Kiernan v. Portland*, 57 Or. 454, 467 (112 Pac. 402, 403, 37 L. R. A. (N. S.) 332), Mr. Justice KING used this language:

"It will be observed from the first sentence in Section 2 that no restriction is placed upon the legislature with respect to the enactment of general laws; the exception being that no special laws creating or affecting the municipalities shall be enacted by the legislature. Under all the rules of construction, this exception reserves to the legislative department the right, whether by the people directly through the initiative, or indirectly through the legislature, to enact general laws upon the subject, making it clear that the inhibition in the next sentence has reference to special laws. * * Our holding is that the state may, by constitutional provisions, directly delegate to municipalities any powers which it, through the legislature, could formerly have granted indirectly. All the prerogatives attempted to be exercised by Portland in the construction of the Broadway bridge formerly could have been granted by the legislature, and the power to provide therefor, having been delegated to the city by amendment to our organic laws, is valid, and the right to exercise such powers will continue until such time as changed by general enactments of the law-making department of our state, provision for which may be made by the legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by the enactment of either general or special laws on the subject."

Further, in *State ex rel. v. Port of Tillamook*, 62 Or. 332, 341 (124 Pac. 637, 640, Ann. Cas. 1914C, 483), Mr. Justice BEAN says:

"Such municipal corporations are always subject to the control and regulation of the lawmakers of the state in the manner directed by the Constitution: *City of McMinnville v. Howenstine*, 56 Or. 451, 456 (109 Pac. 81). While these public corporations are capable of adopting and amending their charter, they still continue to be agencies of the state. A general control is left in the legislative assembly."

Again, Mr. Justice EAKIN, in *Riggs v. Grants Pass*, 66 Or. 266, 271 (134 Pac. 776, 778), says:

“Article XI, Section 2, of the Constitution confers power and authority upon cities to form their own charters and make their own laws within their municipal needs; that is, in local and special municipal legislation. Authority beyond that must come from the sovereign, namely, the legislature, by general laws or by the people by general or special laws.”

Referring to Section 2, Article XI, of the Constitution, it is said in *State ex rel. v. Gilbert*, 66 Or. 434, 439 (134 Pac. 1038):

“This provision of the fundamental law does not in any way infringe upon the right of the legislature to make general laws for the formation of corporations. The inhibition of that section is directed solely against action by the legislature affecting only a particular municipality, city, or town.”

If we concede that the quoted utterances of this court are judicial heresies as the plaintiff's argument proceeds, and that school districts are full-fledged municipal corporations, having each an autonomy all its own, it still remains to consider whether they have charters within the meaning of Section 2, Article XI, of the Constitution, and whether the procedure described in the complaint constitutes an amendment of such an instrument. Dismissing for the moment the idea that a municipal charter is a special legislative act conferring upon a particular municipality powers and privileges peculiar to itself, we must find a charter for the plaintiff, if at all, in the general laws enacted by the legislative assembly affecting school districts, for it is not pretended that any other rule of action affecting the plaintiff has been established either by the people of the state at large through the initiative

process or by similar legislation enacted by the legal voters resident within the boundaries of the plaintiff school district. It is manifest that a school district's rule of existence, operation and treatment is found in the statutes hitherto enacted by the legislative assembly in the exercise of its constitutional authority to "provide by law for the establishment of a uniform and general system of common schools": Section 3, Article VIII, of the Constitution.

In substantially the present form the rule for changing the boundaries of school districts through the action of a district boundary board has been in existence from a date prior to the adoption of the amended form of Section 2, Article XI. It is one of the essential features of the constituent law of school districts. From the viewpoint of the plaintiff it might be called one of the terms of its charter. For all that appears in the complaint, the procedure described whereby the plaintiff was deprived of part of its territory was in strict accordance with the statute. No enactment from any legislative source whatever has in any manner prescribed the boundaries of the plaintiff district. In this respect the case in hand is easily differentiated from such as *Cooke v. Portland*, 69 Or. 572 (139 Pac. 1095); *Thurber v. McMinnville*, 63 Or. 410 (128 Pac. 43); *McKeon v. Portland*, 61 Or. 385 (122 Pac. 291); *State ex rel. v. Port of Tillamook*, 62 Or. 332 (124 Pac. 637, Ann. Cas. 1914C, 483). In all those cases the constituent act establishing the municipality in question described in explicit terms the boundaries in question. The delimitation of its exterior lines was part and parcel of its charter in each instance. In the case of school districts the constituting act has in no wise ever described the boundaries of any particular district, but has committed the establishment and control

of them to a district boundary board. That body, in making such changes, simply administers, and does not amend the laws under which the plaintiff district exists even though we may style those general enactments the charter of the complainant here.

Much was forcefully said at the argument about the evils of gerrymandering as exemplified in the boundaries of the districts named in the complaint; but we have nothing to do with such administrative questions. We have before us in this instance only a question of authority and not of the manner in which it is exercised. The proceedings described in the complaint are not open to the objection urged against them by the plaintiff.

The decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE and MR. JUSTICE BENSON
concur.

MR. JUSTICE HARRIS concurs in the result.

Argued October 27, affirmed November 23, 1915.

DAVIN LAND CO. v. SCHOOL DISTRICT NO. 71.

(152 Pac. 1189.)

Pleading—Form of Allegation—Fact or Conclusion.

1. Allegations, in a suit to enjoin the collection of school taxes by levy and sale, that the defendant school districts levied the special school tax against the plaintiff's property in the districts; that the special school levies were unauthorized and void; that no legal notice of the meeting of the voters was given; that at the meetings to vote the tax persons who were not legal voters voted on the motion to levy the tax, without showing whether they voted for or against the tax or in such numbers as would affect the result; that every act of the districts in levying the tax was void; that the acts of the county clerk, in extending the levy on the tax-rolls was illegal and void—stated merely conclusions of law, and tendered no issue.

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by the Davin, Michellod Sheep & Land Company, a corporation, against School District No. 71, and others. The facts are as follows:

The plaintiff, a corporation, owning property in Wallowa County upon which it pays taxes there, declares against the county, its sheriff and treasurer, and school districts 15 and 71 therein. The complaint avers:

“That School District No. 15 in the said county of Wallowa for the year 1913 levied a special school tax of 5.5 mills against all the property in said district and had the same extended on the tax-rolls of said county for said year; that, by reason thereof, there was levied against the property of the Davin, Michellod Sheep & Land Company in said school district, for said special tax, the sum of \$328.22.”

That pleading contains a similar allegation about School District No. 71, except that the amount of the levy is different. Then follow these statements:

“That the said special school levies made by said districts, and each of them, was not authorized, illegal, and void, and the said school districts and each of them was without authority to make said levies or any levy or levies at all. That no legal or proper notice was given of a meeting of the legal voters of said school districts, to vote said levy as required by law. That said levies and each of them was illegal and void. That at the meeting when said tax was attempted to be voted, and at each and all meetings in both of said districts, parties and persons voted on the motion to levy said tax who were not legal voters in said school districts. That no record of notices of said meeting, nor of said meetings, was made and filed as required by law. That each and every act of said districts and

each of them in attempting to make said levies or levy was unauthorized, illegal and void and contrary to the statutes of the state. That the county clerk of Wallowa County was without authority and power to extend said levy or levies upon the tax-rolls of said county, and that the acts of said clerk were illegal and void."

Narrating, in substance, that it had offered to pay to the tax collector all the taxes assessed against it except what it terms the "illegal and void special school taxes as herein specified," and that the sheriff is about to force collection thereof by levy upon and sale of its property, the plaintiff concludes with a prayer to the effect that such action be restrained and that the school district levies be canceled and held for naught. A general demurrer to this pleading was overruled. The defendants answered admitting many of the averments of the complaint and traversing the remainder. On a hearing of the issues, the Circuit Court dismissed the suit, with costs, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Daniel Boyd*.

For respondents there was a brief over the names of *Mr. Daniel W. Sheahan* and *Mr. O. M. Corkins*, with an oral argument by *Mr. Sheahan*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The allegations attacking the proceedings of the districts resulting in the imposition of taxes upon the property of the plaintiff are purely conclusions of law and contain no statement of any fact except that per-

sons voted on the motion to levy the tax who were not legal voters. As to that, it is not disclosed whether such persons voted for or against the scheme or in such numbers as would affect the result. The plaintiff cannot take anything by that statement. As to the other matter in the excerpt last quoted, it has been constantly decided by this court for many years that, if a pleader desires relief, he must state facts from which the court may draw the desired conclusions. A presentation of the deductions themselves, unsupported by averment of facts, tenders no issue. The precept is established by the precedents here noted: *Longshore Printing Co. v. Howell*, 26 Or. 527 (38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464, note); *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004); *Southern Oregon Co. v. Coos County*, 30 Or. 250 (47 Pac. 584); *Fisher v. Union County*, 43 Or. 223 (72 Pac. 797); *State ex rel. v. Williams*, 45 Or. 314 (77 Pac. 965, 67 L. R. A. 167); *Holmes v. Cole*, 51 Or. 483 (94 Pac. 964); *Drummond v. Miami Lbr. Co.*, 56 Or. 575 (109 Pac. 753); *Morton v. Wessinger*, 58 Or. 80 (113 Pac. 7); *Cook v. Howard*, 59 Or. 372 (117 Pac. 320); *Splonskofsky v. Minto*, 62 Or. 560 (126 Pac. 15); *Hochfeld v. Portland*, 72 Or. 190 (142 Pac. 824).

The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued October 26, affirmed November 23, 1915.

JENKINS v. OWYHEE DITCH CO.*

(152 Pac. 1194.)

Waters and Watercourses—Irrigation—Improvement of Ditches—Necessity.

1. Evidence *held* to show that improvements in a certain irrigation ditch were necessary so as to create no liability for the alleged lowering of the supply level to land owners.

Waters and Watercourses—Irrigation—Improvement in Ditches—Damages—Evidence.

2. Evidence *held* insufficient to show such damage to the plaintiff as to warrant recovery on account of widening and deepening an irrigation ditch.

Waters and Watercourses—Irrigation—Water Rights.

3. Although improvements in an irrigation ditch lower the level of the water at plaintiff's land, he cannot *ipso facto* compel the irrigation company to raise the level of the water or install a stop gate, if the improvement generally benefited other users to whose rights plaintiff's rights are in no way superior.

Waters and Watercourses—Irrigation—Water Rights.

4. Where stock in an irrigation company is not issued as an appurtenance to the land, the rights of the holders of stock to the use of water are reciprocal, and no stockholder is entitled to greater use of the water than any other.

[As to priority of right to use of water of irrigation company, see note in *Ann. Cas.* 1913D, 625.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

The Owyhee Ditch Company was organized as a private corporation prior to 1895. By supplemental articles of incorporation, adopted in 1895, the capital stock is fixed at \$100,000, and is divided into 10,000 shares. The corporation was created for the purpose of appropriating water from the Owyhee River and diverting it through a ditch to be constructed over the following described route:

*On correlative rights of upper and lower proprietors to use water for irrigation, see note in 41 L. E. A. 741. REPORTER.

“Beginning at a point on the north bank of the Owyhee River, in said county, at a point about three miles south of the south line of township twenty (20), range forty-six (46) east, W. M.; thence in a northerly direction for a distance of about twenty (20) miles; thence to fork, one prong running to Snake River, the main ditch continuing on northerly terminating at Malheur River.”

Each share of stock “shall represent, and be entitled to, a water right for two acres, and each share shall represent one vote at any stockholders’ meeting,” and “each water right represented by each share of stock shall be entitled to its proportionate amount of water flowing through the ditch or canal.” Each share of stock may be made liable to an assessment not to exceed 5 per cent per annum, the proceeds of which shall be used for running, operating, and repairing the ditch. The articles of incorporation provide that the company may charge a reasonable rate for the use of the water, but not to exceed \$1 per acre per annum, “the proceeds of which shall be used and applied in the payment of any interest that may be due, or become due, and for the purpose of maintaining a sinking fund, for the purpose of paying any mortgage indebtedness which may be incurred, and other indebtedness which may necessarily be incurred, and which cannot be paid out of other funds of the corporation, but, when not necessary for such purpose, no such charge shall be made.”

It is further stipulated in the articles of incorporation that:

“No water right shall be procured from this corporation, other than that represented by the stock.”

The certificates of stock recite that a person named is the owner of a given number of shares of the capital

stock of the Owyhee Ditch Company, "subject to assessment for unpaid balance due thereon, not to exceed one dollar per annum, until fully paid up, and thereafter at a rate not to exceed 5 per cent on the par value thereof, for maintenance fund, and the by-laws and articles of incorporation of the company. Transferable on the books of the company in person or by attorney on the surrender of this certificate. And the holder is entitled to a water right from said company for [a stated number of] acres of land."

The corporation appropriated 20,000 inches of water in the Owyhee River, miner's measurement under a 6-inch pressure, and in that manner acquired its water right. The company completed its ditch, now commonly known as the Owyhee Ditch, in 1895, and since that time has been distributing water to its stockholders along the route of the canal. The ditch is about 21 miles in length. It was originally constructed with a grade of 16 inches to the mile, except through the hogback where the grade is 19 or 20 inches to the mile for a distance of 2,600 feet. From the intake to the hogback, a distance of 6 or 7 miles, the canal was about 20 feet wide, and from that point on it was narrowed so that at the Jenkins ranch, a distance of 4 or 5 miles below the hogback, the ditch was from 12 to 14 feet wide, and at the mouth it was only about 6 feet on the bottom. The plaintiff owns 200 acres of land through which the ditch runs, in a northerly direction, so as to leave 60 acres on the west and 140 acres on the east side. The land lying west of the ditch is higher, while the land on the east is for the most part below the canal.

This litigation revolves around two tracts of land, aggregating about 22 acres, which are a part of the 140 acres east of the canal; one piece, known as the

alfalfa field, embraces about 8 acres, and the other, referred to as the wheat field, includes about 14 acres. A house stands not far from the southwest corner of the 140 acres east of the canal, and the alfalfa field is located north of the house, while the wheat field is south of it.

At the annual meeting held on September 6, 1910, the stockholders unanimously adopted a resolution reading thus:

“Resolved that it is the sense of this meeting of the stockholders of the Owyhee Ditch Company that the newly elected board of directors immediately take such steps as may be necessary or advisable to put the Owyhee Ditch in the best possible condition to meet the needs and requirements of all the stockholders of the O. D. Co., and that they put in distributing weirs the same as are used by the United States government.”

The plaintiff owned 309½ shares of stock which were voted for the improvement by John Ray as proxy. After the passage of the resolution the board of directors caused the ditch to be cleaned and widened, at an expense of about \$29,000, so that when the work was finished in 1911 the canal was 20 feet wide, except through the hogback, from the intake to a point known as the Emison wasteway, and located about 2 miles below the Jenkins ranch. The ditch was not enlarged below the Emison wasteway.

After the completion of the improvement W. G. Jenkins asked the board of directors for permission to put in a stop-gate in the ditch at his ranch so that he could raise the water level, claiming that the enlargement of the canal had lowered the surface of the water so that he could not irrigate the alfalfa and wheat fields. The ditch authorities refused to permit

the installation of a stop-gate, because of the prohibition contained in a by-law, which provides that:

“No dam, stop-gate, wheel or other obstruction shall be allowed in the Owyhee Ditch.”

The plaintiff afterward commenced this suit by filing his complaint on May 3, 1912. The court found:

That “the water was not lowered at the premises of plaintiff, and that the same land can now be irrigated from said ditch upon plaintiff’s said land as could be irrigated prior to the doing of the work complained of.”

The decree was favorable to the company, and the plaintiff appealed.

AFFIRMED.

For appellant there was a brief with oral arguments by *Messrs. McCulloch & Wood*.

For respondent there was a brief over the names of *Mr. William H. Brooke, Mr. John L. Rand* and *Mr. Ralph W. Swagler*, with oral arguments by *Mr. Brooke* and *Mr. Rand*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1, 2. If the plaintiff can now water the same land that could be irrigated before the enlargement of the ditch, and if his opportunities for using the water have not been lessened or impaired, then Jenkins cannot complain, even though it be assumed that the amount of land which he irrigated and the extent to which it could be irrigated before the widening of the ditch determine and measure the absolute legal right which he now possesses. The improvement which the plaintiff complains of was necessary and in the interest of the stockholders generally. Willows had been per-

mitted to grow along the ditch. The banks had caved off. Sediment and sand had accumulated, and the canal was in poor condition. Breaks occurred frequently. Stockholders living below Jenkins were constantly complaining because of the lack of water; and one witness testified that he had seen the Owyhee Ditch utterly dry four miles below the Jenkins property when the upper users were drawing heavily on the supply. The canal had been cleaned down to the grade line upon which it was originally constructed, but the ditch had not been deepened below that line. From the intake to the outlet the supply of water is now sufficient for all the stockholders. Peter Tensen a witness for plaintiff, says that there was a good deal of trouble getting water through the ditch before 1911; that the obstructions in the canal tended to impede the flow of water, to dam it up, and "make it stand higher than it does now"; but that "it is an excellent ditch now."

After the ditch was cleaned and widened the water level was lower than before 1911. It may fairly be inferred from all the testimony that the accumulated obstructions in the ditch interfered with the flow of the water and tended to raise it; and it also appears from the evidence that the water level was lowered as a result of widening and cleaning the ditch, notwithstanding the fact that the flow was increased about 50 per cent. Estimates of the extent to which the water was lowered range from 6 to 16 inches. Witnesses for the plaintiff testified that the water level has gradually raised above the stage maintained in 1911.

Water for the alfalfa and wheat fields has been taken from the ditch through a tap near the point where the canal enters the premises of plaintiff, and it is then

carried through a lateral dug in the ground to the two tracts. The alfalfa field had been cultivated for five or six years prior to 1911, while a part, but not all, of the wheat field had been cropped since 1908. There is much conflicting evidence relative to the irrigation of the land and the ease or difficulty with which it could be watered; but a careful examination of the entire record will furnish ample support for the conclusion that all of the alfalfa land and all of the wheat field could not be irrigated at any and all times prior to 1911, and that it was necessary to take advantage of the occasions when the water would be at a high stage in the ditch in order to irrigate the two tracts. Fr  d Klingback, who was ditch rider in the years 1906, 1907, 1909 and 1910, when speaking of the alfalfa field, testified that:

Jenkins "irrigated it every year when he would catch the water high enough to irrigate. Sometimes the crop would dry pretty near completely out. * * Every year he had trouble in getting water on that alfalfa field," and that "every year there would be part of it dried out."

On June 21, 1913, levels were run by competent civil engineers, and they ascertained that approximately only about one half of an acre was at that time above the surface of the water in the ditch; that about five acres were lower, but not to exceed nine inches lower, than the water level in the canal; and that the remainder of the land is more than nine inches lower than the water level in the ditch. Peter Tensen, when a witness for plaintiff, stated that:

"Mr. Jenkins could irrigate the same land to-day that he could prior to 1911, but he couldn't irrigate it in 1911, on account of the water at that time being lower."

The plaintiff contends that he was not able to use the water in 1911, although it is admitted that the tenant on the premises failed to irrigate when the superintendent told him that the water in the ditch was high enough for that purpose, and he did not attempt to irrigate until the water had lowered with the fall in the Owyhee River. In July, 1912, when the water was about 17 inches below the high-water mark appearing on the bank, levels were run on the alfalfa and wheat fields by engineers who discovered that even at that stage of the water, when the average level was higher than in 1911, though not so high as in 1913, all but three or four acres could be irrigated by flooding; and the evidence clearly shows that the three or four acres mentioned could be watered by a series of parallel ditches. The case of *Miller v. Imperial Water Co.*, 156 Cal. 27 (103 Pac. 227, 24 L. R. A. (N. S.) 372), cited and relied upon by plaintiff, is not analogous to this suit, because here no attempt is being made to deprive Jenkins of his rightful share of the water; but he can still use the water furnished by the ditch, and he can still irrigate as much land as he could prior to 1911, although he may be obliged to resort to corrugation instead of flooding for a small portion of his land.

3. Assuming even that Jenkins will be obliged to run a new lateral for the alfalfa field, and likewise conceding that it may be necessary to corrugate a small portion of the wheat field, nevertheless the plaintiff does not, under the circumstances presented here, have the absolute right to compel the defendant to raise the level of the water in the ditch and maintain it where it was before. The conditions now existing resulted from a necessary improvement which was made in the interest of all the stockholders and the installation of

a stop-gate would interfere with the flow of the water and tend to thwart the very purpose which the improvement was designed to accomplish. The rights of plaintiff are no greater than the rights of lower users. No one share of stock can be favored at the expense of another share of stock; and, moreover, all the stock owned by Jenkins was voted for the improvement of the ditch. The enlargement of the canal has been the means of supplying water to those who could not obtain it prior to 1911, although they were just as much entitled to receive water as was the plaintiff.

4. It must be remembered, too, that the shares of stock were not dedicated to any described land; that the stock held by Jenkins was not issued to him as an appurtenance to his land; and that, therefore, the rights and obligations of the stockholders, when considered in relation to their use of the water, are peculiarly reciprocal.

The evidence justifies the conclusion arrived at by the Circuit Court, and the decree is affirmed.

AFFIRMED.

Argued October 27, affirmed November 23, 1915.

TWITCHELL v. THOMPSON.*

(153 Pac. 45.)

Appeal and Error—Harmless Error—Challenges to Jurors.

1. Where the court wrongfully overrules a challenge to a juror for cause, but the objecting party peremptorily challenges such juror, the error was cured.

*On relationship to private corporation or association for profit which will disqualify a juror in a civil action in which it is interested, see note in 40 L. R. A. (N. S.) 978.

On applicability of doctrine of last clear chance where danger not actually discovered, see notes in 55 L. R. A. 418; 36 L. R. A. (N. S.) 957.

REPORTER.

Jury—Challenge—Interest.

2. Where, in an action for personal injuries, the defendant was president of a bank in which one juror was a depositor, while two others were its debtors for considerable sums, the retention of such jurors over plaintiff's objection was proper, since the indirect relationship of the jurors to the defendant was not such as to disqualify them, as a matter of law; the propriety of their sitting being a question of fact for the trial court, not reviewable in the absence of an abuse of discretion.

Municipal Corporations—Streets—Automobile Accident—Last Clear Chance.

3. Where defendant drove his automobile into plaintiff, whose own negligence had put him in peril, defendant was not liable under the doctrine of last clear chance unless he actually did discover plaintiff's danger in time to avoid the accident, not merely because he should have so discovered the danger.

[As to concurrent negligence of plaintiff as defeating recovery under last clear chance doctrine, see note in *Ann. Cas.* 1912B, 888.]

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is an action by Sharon Arnold Twitchell, by L. E. Twitchell, his guardian *ad litem*, against W. L. Thompson, for personal injuries. The complaint, so far as it is of interest in the consideration of the case, reads thus:

"That on the 23d day of July, 1914, the plaintiff, Sharon Arnold Twitchell, while using the public street of said City of Pendleton, in a lawful way and riding on a bicycle upon the same, came down Court Street from the east and turned around the corner of Court and Lee Streets to the north, riding in a lawful manner on the right-hand side of the street, as required by the ordinances of said city, and while so lawfully riding upon and using said street he was run down by the defendant in an automobile by reason of the negligence hereinafter set forth. That said defendant, driving a heavy automobile came east on Lewis Street, a street one block from Court Street, and running parallel with Court Street and turned to the right into Lee Street and came down Lee Street with the intention of turning again to the right into Court Street and going west

on Court Street. That instead of turning at the curb and close to the curb on the right-hand side as the defendant turned into Lee Street, he negligently and carelessly crossed said street onto the left-hand side of Lee Street, and negligently and carelessly came down Lee Street on the left-hand side of said street, and negligently and carelessly ran said automobile along said street on the left-hand side at a dangerously high rate of speed, very much in excess of 15 miles per hour, and negligently and carelessly failed to slack up as he came close to the intersection of Court Street, and negligently and carelessly failed to slacken his speed to 10 miles an hour or to slacken his speed at all, as he came to the turn into Court Street. The plaintiff was in plain sight coming along the east side of Lee Street, and that defendant either did see him or could have seen him with the exercise of reasonable care and would have seen him with the exercise of such care, and that said defendant, either negligently and carelessly failed to keep a lookout in front of him as he was driving his car, or negligently and carelessly failed to slack up and stop when he saw the plaintiff in front of him on said bicycle, and negligently and carelessly continued to run said automobile down toward the plaintiff and upon and over the plaintiff, although the plaintiff was in plain sight as aforesaid, and although the said defendant could plainly see that the plaintiff was in danger and would not be able to get out of the way. That by reason of all and singular of the acts of negligence upon the part of the defendant herein stated, he struck the plaintiff and the wheel which plaintiff was riding, and threw plaintiff down and ran against plaintiff with great force and violence whereby plaintiff was greatly and grievously bruised and injured in his body, limbs, and upon his head, and his skull was partly broken and crushed, and his brain and back and spinal cord were injured, and plaintiff was greatly cut and disfigured and suffered great pain and agony, and his limbs and body were, and always will continue to be, partly paralyzed, and his mind was and always will continue to be affected, and his memory will be affected,

whereby plaintiff will be deprived of the power of enjoying many of the pleasures and comforts of life, and will continue during all his life to suffer great physical and mental pain and agony, all to his damage in the full sum of \$30,000."

The answer, after some admissions as to the age of plaintiff, the guardianship, the location of the streets and other matters, denies all the allegations of negligence upon the part of defendant, and in an affirmative defense alleges that the injuries suffered in the accident by plaintiff were the result of his own negligent and wrongful acts. The reply joins issue upon the affirmative matter in the answer. From a judgment in favor of defendant, plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. Alfred S. Bennett* and *Messrs. Fee & Fee*, with an oral argument by *Mr. Bennett*.

For respondent there was a brief over the names of *Messrs. Raley & Raley* and *Mr. Frederick Steiwer*, with an oral argument by *Mr. James H. Raley*.

MR. JUSTICE BENSON delivered the opinion of the court.

1, 2. The assignments of error raise but two questions for our consideration. The first of these relates to the action of the trial court in overruling plaintiff's challenge for cause of three jurors. The examination of these men on *voir dire* discloses that the defendant was then president of a bank in Pendleton; that the juror Folsom was a depositor therein; and that the jurors Eldridge and Butler were debtors of the bank for considerable sums. When the challenge as to Folsom was overruled plaintiff had not exercised any of his peremptory challenges and did not use one upon

this juror. At the time the court passed upon the challenges as to the jurors Eldridge and Butler the plaintiff still had two peremptory challenges available and employed them in dismissing these two men from the jury. We think that the question as to the jurors Eldridge and Butler is disposed of by the decision of this court in the case of *State v. Humphrey*, 63 Or. 540 (128 Pac. 824), from which we quote:

“It is well settled that, although the court sitting in the trial of the cause may have erred in overruling a challenge for cause, yet the error is cured by the exercise of a peremptory challenge against the juror in question.”

As regards Folsom, the alleged error of the court in retaining him as a juror over plaintiff's objection, and, indeed, as to all three of the jurors named, this court has answered such objections quite fully in the case of *Harrison v. Pacific Ry. & Nav. Co.*, 72 Or. 553 (144 Pac. 91), in which we read thus:

“The alleged bias of the jurors of which the defendant complains consisted in the fact that the plaintiff was the president and principal owner of a bank in Tillamook, which was patronized by at least nine of the jurors who sat in the trial of the case. They were either depositors in the bank or owed it small sums of money, and all declared in substance, on *voir dire*, that the indirect relation they sustained to the plaintiff by virtue of their business dealings with the bank with which he was connected would not influence them in their decision of the case. This feature was elaborated by the examination of the jurors in question and over the objection of the defendant the court accepted them for the trial of the cause. * * We cannot say as a matter of law that the relationship described above disqualified the jurors. The propriety of such men acting in that capacity is a question of fact to be determined by the trial court from all the evidence, and

unless an abuse of discretion clearly appears, we cannot overturn its conclusion. The men themselves were before the court. The judge observed them and under such circumstances was far more capable of determining whether they would act impartially than we who only see the paper record."

3. We now come to a consideration of plaintiff's second contention, which is that the trial court erred in its refusal to give two instructions which were requested by appellant, and in giving one to which plaintiff objected. It is not necessary to set these out in full for the one point urged is that, in the application of the doctrine of "last clear chance" the defendant should be held liable for the injuries incurred, if after he saw plaintiff's danger, or if in the exercise of ordinary care he could have discovered it, he might still have avoided the accident. The instruction as given by the court would have been satisfactory to plaintiff if it had contained the words, "or if in the exercise of ordinary care he could have seen him on said street." However, this court has definitely adopted the doctrine expressed by the Supreme Court of California in the case of *Herbert v. Southern Pacific Co.*, 121 Cal. 227 (53 Pac. 651), in which Mr. Justice TEMPLE says:

"Doubtless, notwithstanding the negligence of a plaintiff has put him in peril, yet if his danger is perceived by the defendant in time, so that by the exercise of ordinary diligence on his part injury can be avoided, the defendant will be held for the injury. But that is based upon the fact that a defendant did actually know of the danger—not upon the proposition that he would have discovered the peril of the plaintiff but for remissness on his part. Under this rule, a defendant is not liable because he ought to have known."

In the case of *Stewart v. Portland Ry. L. & P. Co.*, 58 Or. 377 (114 Pac. 936), Mr. Justice McBRIDE says:

"In order to invoke the 'last clear chance doctrine,' plaintiff must plead and prove that defendant, after perceiving the danger and in time to avoid it, negligently failed to do so."

This statement of the law has been approved and followed in the cases of *Scholl v. Belcher*, 63 Or. 310 (127 Pac. 968); *Richardson v. Portland Ry. L. & P. Co.*, 70 Or. 330 (141 Pac. 749). The court therefore did not err in refusing to instruct the jury in accordance with plaintiff's theory. Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

Submitted on brief October 27, affirmed November 23, 1915.

STALKER v. STALKER.*

(153 Pac. 52.)

Specific Performance — Parol Contract for Sale of Land — Part Performance.

1. The taking possession of real estate pursuant to an oral contract for the sale thereof is such part performance as will take the contract out of the statute of frauds unless the relation of affinity or consanguinity exists between the vendor and purchaser, in which case the making by the purchaser of valuable improvements in addition to the taking of possession is essential to specific performance of the contract.

Specific Performance—Parol Contracts—Evidence—Sufficiency.

2. Evidence held to justify a finding that a husband orally contracted to convey land to his plural wife, and that she took possession of the land relying on the contract and made valuable improvements thereon authorizing her heirs to compel specific performance.

[As to the certainty essential to a contract that is to be specifically performed, see note in 26 Am. Dec. 661.]

From Baker: GUSTAV ANDERSON, Judge.

*On sufficiency of possession alone as ground for granting specific performance of parol gift of or contract to convey real property, see note in 8 L. E. A. (N. S.) 870.

REPORTER.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by E. Lucille Stalker and others against Alexander R. Stalker and others to quiet the title to real property. The material facts are that on March 22, 1882, when Section 5352, Revised Statutes of the United States, denouncing bigamy, was amended, Emily E. Stalker was a plural wife of Alexander Stalker, and both were members of the Church of Jesus Christ of Latter Day Saints and then residing in the territory of Idaho, where their sons and daughters, the plaintiffs, were born prior to January 1, 1883, and each was legitimated by Section 7 of the amended enactment: 22 U. S. Stats., c. 47. Mr. Stalker, fearing prosecution for polygamy in Idaho, determined to put away such plural spouse and for that purpose he came, in the summer of 1886, to Pine Valley, Baker County, Oregon, where he purchased the northwest quarter of section 26 in township 7 south, range 45 east, of the Willamette Meridian, paying for the land \$700, and also laying out about \$300 in building an addition to the house on the premises. In the fall of that year he caused the plaintiffs and their mother to be removed to and settled upon this land. He took the title to that quarter section in his own name, so that if the plural wife became discouraged she could not immediately sell, convey or mortgage the real property, and with the money thus obtained return to her former home and trouble him. The next year after the plaintiffs and their mother were taken to the land, Mr. Stalker went back to Idaho and never returned to Oregon. At the time the tract was purchased, there were only a few acres of it improved, but the plaintiffs removed the brush growing on the premises, cleared about 70 acres, and made many perma-

ment and valuable improvements upon the real property until it is now worth about \$6,000 as a result of their labor. Mr. Stalker collected the rent of the premises while he so occupied them, but thereafter the plural wife lived upon the land or received the rents accruing from a lease thereof. He, for a consideration of \$25, conveyed to the plaintiff E. Lucille Stalker $1\frac{3}{4}$ acres of the premises, and he has paid the taxes annually imposed on the land to and including the levy for the year 1910. The plural wife, on August 10, 1910, wrote Mr. Stalker a letter from which an excerpt is taken, viz.:

"The man who has the farm, his lease will expire this fall, and like all rented places 'tis in a bad shape. I left it fenced and house in good repair, but it will take some money to fix it up, so I think it would be only right for you to give me the deeds and I can sell the place. This you will think a big demand but I think 'tis a small compensation for the many years I was your willing slave for you and your entire family."

Replying to such solicitation, he wrote her as follows:

"Agreeable to request, I am making an effort to furnish you a legal deed to your home in Pine Valley. * * The original deed would not be of any service to you, therefore I suggest that you draw up a deed, taking Lucille's as a basis, describing the parcel of land Lucille owns in the premises. I ask this to make her safe, and because I cannot describe it. Give the metes and bounds carefully, fill out the whole matter agreeably to the method they do such things in Oregon, then send to me and I will have it attested and sworn to before a notary public and returned to you."

He on December 20, 1910, mailed to his son, the defendant Alexander R. Stalker, a letter wherein he referred to the plaintiff Walter R. Stalker, saying:

"I write in regard to my property in Pine Valley. Emily has through a lawyer in Portland written to me requesting me to give her a deed to the property there. I thought the matter over and concluded to do so, and wrote to her to that effect, as it has been an elephant on my hands through all these years. But have since written to Wallace and he tells me that the property there is worth fifteen or sixteen thousand dollars. How is that, or do you know anything about values there? If he is correct about that, that would be giving her too great an advantage over the rest of you. The deed I received today to be filled out and signed. How does this appeal to you? I wish to do the right thing all around but if Wallace's estimate of the property is near right, this would be a wrong to the rest of you, and therefore the only thing left for you would be to take out an injunction and prevent it (I mean your mother's children). I had a misconception regarding the value of the property if he is any where near correct. I have had a number of persons writing from Pine who wished to buy, Wallace among the number, but I studiously refused to sell not wishing to leave the family without a home. What have you to advise in the premises? Tell me what you know without reserve at your earliest convenience. I have been to great expense paying taxes, water suit, etc."

No deed was returned from Mr. Stalker, who died in March, 1912, and the plaintiffs' mother died November 14th of that year. Hortensia Stalker, the first and legal wife, died in the year 1908, leaving then surviving her husband Alexander Stalker and their sons and daughters, the defendants in this suit.

The complaint alleges that the plaintiffs are the heirs at law of Emily E. Stalker, who died intestate; that they and their mother were removed by Alexander Stalker and settled upon the land in Baker County, Oregon, "under a verbal contract and agreement that the said tract or parcel of land should be the property

of said Emily E. Stalker, and the said Emily E. Stalker then and there was put into and took possession of said land under said verbal agreement and contract that the same should be conveyed to her''; that she had undisputed possession of the land which she cultivated more than 26 years and up to the time of her death, since which the plaintiffs have been in possession of the premises, except a small portion thereof which with the consent of their mother was conveyed by their father to the plaintiff E. Lucille Stalker. Reference is then made to the correspondence between their mother and father, as hereinbefore set forth, and it is further alleged, upon information and belief, that pursuant to such agreement and correspondence their father executed to their mother a deed to the premises, which deed was either lost in the mail, or destroyed by some person to whom it was intrusted by the grantor to be posted to the grantee; and that the plaintiffs are informed and believe that the defendants, as the heirs of Alexander Stalker, are claiming an adverse interest in the land.

The answer denies the material averments of the complaint, and for a separate defense and by way of cross-bill alleges that the defendants are the sole heirs at law of Alexander Stalker, deceased, the issue of his legal marriage with their mother his first and only wife; that no marriage ever occurred between their father and the plaintiffs' mother; and that their father died seised of an estate of inheritance in and to the real property described in the complaint, to all of which they are entitled by inheritance.

The reply put in issue the allegations of new matter in the answer, and, the cause having been tried, the plaintiffs secured a decree as prayed for in the complaint, and the defendants appeal. **AFFIRMED.**

For appellants there was a brief over the names of *Mr. William H. Strayer* and *Mr. William Smith*.

For respondents there was a brief submitted by *Mr. L. C. Garrigus*, *Mr. John L. Rand*, *Mr. A. A. Smith* and *Mr. William H. Packwood, Jr.*

Opinion by MR. CHIEF JUSTICE MOORE.

It is contended that as Emily E. Stalker was living upon the land in Baker County, Oregon, when Alexander Stalker returned to Idaho, she did not take possession of the premises under any contract that the title to the real property should be conveyed to her; for which reason an error was committed in rendering the decree brought up for review. In *Roberts v. Templeton*, 48 Or. 65 (80 Pac. 481, 3 L. R. A. (N. S.) 790), it was held that where the plaintiff, up to the time of his oral purchase of the interest of a tenant in common in a mine, was in possession under a contract with a cotenant of the vendor, so that his prior possession merged into that under his purchase, there was not such a change of possession under the contract as to take the case out of the statute of frauds, and for that reason specific enforcement of the oral agreement would not be decreed. To the same effect, see the case of *Tonseth v. Larsen*, 69 Or. 387 (138 Pac. 1080).

1. We do not regard the possession of the real property which was secured and taken by Emily E. Stalker as coming within the rule announced in that case. She came upon the land, it is true, before Mr. Stalker went back to Idaho, never to return; but she was not in possession of the property, nor did she secure a right thereto, as a tenant or otherwise, until he abandoned the premises. It is possible this plural wife might

never have been treated as Hagar and driven off the land as a trespasser by the person so holding the legal title so long as he lived. She was never compelled to pay any rent for the use of the real property, but she could undoubtedly have been evicted if an action had been instituted for that purpose, unless she could have interposed the plea that she took possession under and made valuable improvements pursuant to an oral contract that she was to secure the legal title when she had become so pleased with the new home as not to leave it and return to Idaho and thereupon possibly subject Mr. Stalker to indictment and prosecution for polygamy.

“The mere physical fact of possession,” says a noted author, “is not of itself conclusive, nor even material. The possession must be taken and held with the intent of carrying out and executing the agreement. The existence of this intent is vital, and is the essential element which the courts require as a condition of the part performance upon which a decree of specific execution may be based. This intent, however, cannot be shown by proving the verbal contract between the parties, for such a course would be a most vicious arguing in a circle. It must therefore be established by matter outside of the agreement”: Pomeroy, *Specific Performance* (2 ed.), § 116.

As between strangers a change of possession of land is sufficient to take a case out of the statute on the ground of fraud, and a party who has thus secured possession of real property under a parol contract to purchase the premises may enforce, in a suit in equity, a specific performance of the agreement, because otherwise he might be treated as a trespasser: *Coney v. Timmons*, 16 S. C. 378. That Mr. Stalker did not drive the plaintiffs and their mother from the land probably resulted from his innate sense of duty to furnish them

a home. If he had died intestate soon after possession of the premises was delivered to the plural wife, it is reasonable to suppose that the defendants, who are the issue of a lawful marriage, could have had no great love for the plaintiffs and would have undertaken to eject them from the land, as is evidenced by an averment in the answer to the effect that Alexander Stalker died seised of an estate of inheritance in and to the real property, and the defendants as his sole heirs at law are entitled thereto.

The possession of real property, when taken pursuant to an oral contract for the sale thereof, is generally held to be such an act of part performance as to take the case out of the statute of frauds, even without any additional circumstance, such as the payment of the consideration, or the making of improvements: *Pomeroy*, *Specific Performance* (2 ed.), § 115; *Sprague v. Jessup*, 48 Or. 211 (83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410); *Barrett v. Schleich*, 37 Or. 613 (62 Pac. 792). In the latter case, however, it was ruled that, when any relation of affinity or consanguinity was shown to exist between the vendor and vendee under a parol contract to convey land, the making of valuable improvements was essential to establish the right to enforce specific performance of the agreement. To the same effect, see *Pugh v. Spicknall*, 43 Or. 489 (73 Pac. 1020, 74 Pac. 485).

2. In the case at bar, no direct evidence was offered tending to substantiate the making of the parol agreement, because both parties thereto were dead. Such fact, however, is sought to be established by inference and by declarations against interest made by Mr. Stalker. It must be admitted that the oral admissions of a party ought to be viewed with caution: Section 868, subd. 4, L. O. L. Such avowals may not have

been correctly understood, or accurately remembered so as precisely to be repeated. So, too, in the pretended iteration, words, phrases or sentences may have been purposely misquoted in order to promote a selfish interest. The plaintiff J. L. Stalker testified that at different times he had heard his father say the land in Baker County, Oregon, was for the plaintiffs and their mother. The plaintiff W. R. Stalker testified he had heard his father several times say to his mother: "The place is for you and the children." The stipulated testimony of the plaintiff W. H. Stalker is to the effect that his father and mother were members of the Mormon church, and each had told him they had been married according to the rites of that religious organization.

"That at the time my father left Pine Valley for Idaho he told my mother in my presence that he had bought the place mentioned in the complaint for her and her children, and that he gave it to her, and that it was hers, and that he was going to Idaho and was not coming back, and that he would after a while send her a deed, but that he didn't give her a deed at that time because he was afraid if he did she might become dissatisfied, sell the place, and return to Idaho and get him into trouble, and for that reason he was going to hold the title for a while, but for her to go ahead and improve the place, and that he would give it to her in consideration of her supporting and taking care of his children."

The plaintiff W. R. Stalker, in referring to a conversation he had with Alexander Stalker, testified:

"Father asked why we had gone away to school and hadn't stayed on the place, and I told him we didn't feel a very great interest in the place because he held the deed for it; that he hadn't given us or mother a deed.

“Q. What did he say?

“A. He said, ‘You are really better off the way it is, because I pay the taxes.’ ”

The defendant A. R. Stalker, referring to a conversation he had at Salt Lake City, Utah, with his father, respecting the demand of Emily E. Stalker, testified:

“He said that she had asked him for a deed to the Pine Valley property, but he had not made her any deed, and didn’t intend to make her any deed.”

Notwithstanding contrary inferences may reasonably be deduced from the testimony, it is believed the oral declarations so imputed to Alexander Stalker, when viewed in connection with the admissions contained in his letters hereinbefore set forth, unmistakably show that a parol contract had been entered into between him and his plural wife, whereby he surrendered to her the land in Baker County, Oregon, and that when he abandoned the premises and returned to Idaho she thereupon took possession of the same and, relying upon his oral agreement to execute to her a deed of the property, made permanent and valuable improvements thereon.

It will be remembered that this suit is predicated on the assumption that Alexander Stalker had duly executed a deed of the land to the plaintiffs’ mother and had delivered the sealed instrument to some person to be mailed to her. The prayer of the complaint is that the defendants be required to set forth by answer their alleged claim to the premises, that their asserted right to the land may be quieted and the plaintiffs’ title confirmed, “and for all proper and equitable relief.” It is possible such deed may never have been executed, as seems to be indicated by the testimony of the defendant A. R. Stalker, who stated upon oath that his

father informed him he had not given the deed and did not intend to make any to Emily E. Stalker. The prayer of the bill being also for general relief, the plaintiffs as the sole heirs of Emily E. Stalker, deceased, are entitled to a specific performance of the terms of the parol agreement whereby she was given possession of the real property and made improvements upon it. The decree of this court, when the mandate is entered in the court below, shall stand as and for a conveyance by each of the defendants of all his right, title, interest and estate in or to the real property described in the complaint, and also each of the defendants and all persons claiming or to claim by, through, or under them, or either of them, any estate or interest in or to the premises or any part thereof, will be barred, and the plaintiffs' title thereto quieted.

The decree of the trial court should therefore be affirmed, and it is so ordered. AFFIRMED.

Motion to dismiss appeal denied September 7, 1915.
Dismissed on stipulation November 29, 1915.

OBERLIN v. OREGON-WASHINGTON R. & N. CO.

(151 Pac. 367.)

(See 71 Or. 177; 142 Pac. 554.)

Appeal and Error—Proper Showing to Complete Transcript Allowed.

1. Where it is shown that failure to complete transcript was on account of sickness, and want of assistance in transcribing shorthand notes of the evidence, a rule on the clerk of the lower court will be made to supply the omission under Section 555, L. O. L., and the appeal will not be dismissed for insufficient transcript.

From Multnomah: HENRY E. MCGINN, Judge.

Statement by MR. JUSTICE BEAN.

This is an action by Frank R. Oberlin against the Oregon-Washington Railroad & Navigation Company, a corporation. The following facts appear of record:

Judgment was rendered by the Circuit Court in this cause October 13, 1914. Notice of appeal and undertaking were served by appellant upon respondent on December 7, 1914. Appellant, on January 8, 1915, filed in this court a transcript of the judgment, notice of appeal and proof of service thereof, and undertaking on appeal and proof of service of the latter. This was during the October term of 1914. On July 29, 1915, respondent filed a motion to dismiss the appeal herein for the reason that appellant has not filed a transcript or abstract as required by Section 554, L. O. L., as amended by Laws of 1913, page 618. The appealing defendant, by a cross-motion, supported by affidavit, requests that it be allowed to supply a defect in the transcript by filing an abstract containing a bill of exceptions, together with the evidence attached thereto, and asks for a rule on the clerk of the lower court to certify and return the same.

MOTION DENIED.

APPEAL DISMISSED ON STIPULATION.

Messrs. Sinnott & Adams, for the motion.

Mr. William W. Cotton, Mr. Arthur C. Spencer and Mr. Charles E. Cochran, contra.

MR. JUSTICE BEAN delivered the opinion of the court.

It will be noticed that the motion to dismiss is not for want of a transcript, but because that document is insufficient. Respondent filed objections to the granting of further time for the completion of the transcript or the filing of an abstract. That this court has juris-

diction of the cause must be conceded. Any question arising in regard to the pleadings can be examined without any amplification of the record.

It is shown by affidavit on the part of appellant that the delay in perfecting the record was caused by the inability of defendant to obtain a transcript of the evidence and proceedings in the case from the court reporter who took notes of the evidence; that affiant was delayed in furnishing such typewritten transcript on account of sickness in his family and want of assistance in deciphering and transcribing such shorthand notes; that the delay was not the fault of defendant. Under these circumstances the remedy should be allowed as provided for in Section 555, L. O. L., to the effect:

“When it appears by affidavit to the satisfaction of the court that the transcript is incomplete in any particular substantially affecting the merits of the judgment or decree appealed from, on motion of the respondent the court shall make a rule upon the clerk of the court below, requiring him to certify as to such alleged omission, and if true, to transmit to the appellate court a certified copy of the pleading, entry, order, or other paper omitted in the transcript; or, in such case, the respondent may move to dismiss the appeal, and the court shall allow such motion unless, on the cross motion of the appellant, it makes a rule upon the clerk concerning such omission, as provided in this section.”

Defendant asks until September 15, 1915, to submit an abstract of the record. It appears to be an overworked court officer, and not an attorney, that necessitates the time concerning the omission.

The motion to dismiss should be denied and the rule on the clerk of the lower court made as indicated above; and it is so ordered.

MOTION DENIED.

DISMISSED ON STIPULATION.

Argued October 27, affirmed November 30, 1915.

YORK v. DALTON.

(153 Pac. 60.)

Partnership—Accounting Between Partners—Evidence.

1. Evidence *held* to show an accounting had been made between partners prior to the death of one.

Partnership—Actions for Accounting—Evidence.

2. Evidence *held* to sustain the findings of the court in an action for an accounting against a member of the former partnership.

[As to actions between partners, see note in 12 Am. Dec. 649.]

From Baker: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit by Effie L. York, administratrix of the estate of James T. York, deceased, against James Dalton for an accounting of the partnership affairs between James T. York, deceased, and James Dalton, the defendant, who were equal partners. The surviving partner made no application for the administration of the partnership estate, and therefore, pursuant to the statute, the same was administered by the administratrix of the estate of the deceased, James T. York. After taking an accounting the Circuit Court found that certain land purchased from one Miller was held in trust by York for the partnership, and rendered a decree in favor of defendant for the sum of \$317.28 as a balance due him from the York estate in settlement of the partnership accounts, and also of all private dealings between the two men. Defendant appeals. By her complaint the plaintiff shows that she is the wife of James T. York, deceased; that he died on October 24, 1912, at which time the partnership owned 2,908 sheep and lambs, 691 tons of hay, one stallion of the probable value of \$500, and one camp wagon worth

\$40, and was owing various sums of money; that on January 24, 1913, plaintiff and defendant divided equally all the sheep and the remaining portion of the hay, plaintiff retaining possession of the stallion and defendant of the camp wagon; that during the administration of the estate the plaintiff expended and paid claims owing by the partnership in the sum of \$3,212.82.

The defendant admits a portion of the complaint, and sets forth that the partnership was formed about September 10, 1908, at which time they borrowed \$8,000, which was paid for 228 head of steers; that at different times they purchased livestock and conducted a large business; that York purchased 120 acres of land in Union County on behalf of the firm, taking title to the same in his individual name; that there is about \$20,000 due Dalton from the partnership. The record discloses numerous partnership transactions involving considerable amounts.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. McCulloch & McCulloch*, with an oral argument by *Mr. Charles H. McCulloch*.

For respondent there was a brief over the names of *Mr. John L. Rand*, *Mr. A. A. Smith* and *Mr. William H. Packwood, Jr.*, with oral arguments by *Mr. Rand* and *Mr. Smith*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. It appears that Dalton conducted the principal part of the firm's business for a time, keeping no regular book accounts. He states:

"When we first started in, we kind of divided the thing up. * * After I turned the business over to him [February 14, 1909] * * he said he would keep books."

Mr. York kept the accounts in pocket memorandum-books. It seems that Mr. Dalton and Mr. York had implicit confidence in each other. Both were successful business men and had means. At the time of making the various settlements they would take into consideration large items, known to them, of which no record was made. Mr. Dalton vouches for the truth of any account found in Mr. York's handwriting. One of the principal questions for determination in this case is: Over what period of time should this accounting extend? It is admitted that there was a settlement between the parties up to March 1, 1910. We also find in Mr. York's book, Exhibit 24, "Settled up to March 1, 1910, \$500.00 running expenses for sheep." In Dalton's book, underneath items of partnership account, we find the following in his handwriting: "November 10, 1910, Paid in full except \$500.00 on hand." He crossed out the account to that date in the same manner as old accounts of 1908. Dalton claims, however, that \$3,100 was due him upon this settlement, but the evidence shows that York deposited large amounts in the bank to Dalton's credit, of which deposits Mr. Dalton had not been notified, and also that York expended considerable sums in the business, none of which had been credited to York by Dalton. We think that the parties settled to the above date in a more satisfactory manner than an adjustment can now be made for them, and that such settlement should not be disturbed.

2. At one time during the summer of 1912, Mr. York employed one Sturgill to make a statement of account for the firm, and informed him that they had settled up to February 1, 1911. A partial statement was made, but not completed, before Mr. York's death.

From the fact that Mr. York appears to have been paying strict attention to the care of the livestock and made brief memoranda of the business, it is difficult to ascertain the exact standing of the account. Mr. Dalton presented a verified account to the administratrix, in which the first item charged was "November 10, 1910, balance on hand \$500.00"; the second, "December 1, Travillion 63 cows & one bull \$2050.00." No other items appear dated prior to February 1, 1911. It is conceded by plaintiff that the \$2,050 for the Travillion cattle should be accounted for on the part of York of a date later than February 1, 1911, which practically brings the account down to the latter date. We have noted the various settlements for the purpose of showing the manner of conducting the business and recording the same.

It is clearly shown by the evidence that the \$500 on hand November 10, 1910, was paid to one Dustan who had charge of the sheep and was expended by him in caring for them prior to February 1, 1911. From a careful perusal of the 360 pages of typewritten evidence and an examination of the various exhibits in the record we find that the conclusion reached by the Circuit Court is substantially correct. We are confirmed in this belief by looking at the matter in a general way and considering the larger items. At one time the sum of \$8,000 was borrowed from the bank by the partners and placed to the account of James T. York. At another time \$9,000 was obtained as a loan and placed to the credit of Mr. Dalton. As to these large amounts the men did not appear to rely upon the memorandum accounts, but upon their memory, and the notes in the bank, and they rested upon an entirely different footing from the expenses in caring for the livestock.

After February 1, 1911, we make the net receipts received by James T. York from the partnership to be \$1,335.75, and those received by Dalton, \$642.29, making a total of \$1,978.04. Deducting from York's receipts the amount to be paid Dalton, or \$346.73, and adding the same to the amount received by Dalton, makes a net amount of receipts by each partner of \$989.02. To the balance due from York's estate to Dalton, \$346.73, should be added the balance due Dalton on private individual accounts of the two men of \$2.05, making the amount of the decree in favor of Dalton \$348.78.

With this slight correction above noted, the decree of the lower court is affirmed; plaintiff to recover costs.

AFFIRMED.

Argued September 14, affirmed October 19, rehearing denied December 7, 1915.

KAHN v. HOME TELEPHONE & TELEGRAPH CO.*

(152 Pac. 240.)

Master and Servant—Injury to Third Person—Presumption and Burden of Proof.

1. Where an injury to a third person occurs through the negligence of a driver regularly employed by the owner of an automobile, the jury are justified in inferring that the driver was acting within the scope of his authority, and upon the employer's business, and the employer has the burden of rebutting such evidence by showing that the real fact is otherwise.

Appeal and Error — Review — Question of Fact — Constitutional Provision.

2. In an action for injury to a third person, from defendant's automobile operated by its regular driver, a verdict that it was being

*Making *prima facie* case of responsibility for negligence of driver of automobile by proof of defendant's ownership of car or employment of driver is the subject of a note in 46 L. E. A. (N. S.) 1091.

REPORTER.

used in the employer's business cannot be disturbed in view of the Constitution as amended in 1910 by the adoption of Article VII, Section 3 (see Laws of 1911, p. 7), providing that no fact tried by a jury shall be re-examined, unless the court can affirmatively say there is no evidence to support it.

Trial—Argument of Counsel.

3. In an action for injury to plaintiff through the negligence of the driver regularly employed by the owner of an automobile, where the issue was whether the driver was acting in the scope of his employment, argument for plaintiff that defendant was trying to beat the plaintiff out of his just deserts and to prevent him from getting justice, that it was an outrage for defendant to say that it had not injured plaintiff, and asking the jury to put themselves in the plaintiff's place, resting upon some basis in the testimony, was not reversible error.

Appeal and Error—Review—Argument of Counsel—Request for Charge.

4. An argument for plaintiff that the poor needed the protection of the golden rule more than men of the class of defendant's counsel and its well-fed manager, to which objection was sustained, without request for an instruction to disregard it, will not be considered on appeal.

Appeal and Error—Review—Exception—Argument of Counsel.

5. Alleged improper argument of counsel, not made a part of the bill of exceptions, will not be considered on appeal.

From Multnomah: DAVID R. PARKER, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is an action by J. C. Kahn against the Home Telephone & Telegraph Company, a corporation, to recover damages for personal injuries. The testimony on behalf of plaintiff tended to show that, while attempting to board a street-car at the corner of First and Morrison Streets, in Portland, he was run against and injured by an auto truck owned by defendant and driven by defendant's chauffeur; that there were two other employees of defendant in the truck at the time, and that it also contained a quantity of wire and other material owned by defendant and used by it in the construction and operation of its lines. The testimony for defendant was elicited principally from Brown, the chauffeur who was in charge of the truck, and Raser

and Morgan, two employees, who had been engaged that day in repairing defendant's telephone lines. Brown testified, in substance, that they had been at work at East Thirty-ninth and Belmont Streets, on the east side of the Willamette River, and a considerable distance from the place of the accident, which was on the west side; that he kept the truck at his home on the east side, and had no work or errand for the company on the west side; that upon the evening of the accident after the work was done he had an errand of his own, namely, to get a phonograph that he had left at a music store on the west side, and instead of going home came across the river to perform this errand; that he had no permission to use the truck on his own business, but that he guessed drivers generally did so if there was nothing said; that he was not in the habit of taking the truck out at any time he wished, and never took it off the premises on his own business after he had once taken it home, but that he sometimes took the workmen to dinner in it if it was handy to do so, and usually took them to the place where they could take the street-car for their homes if it was not too far out of the way; that Morgan was foreman of the work, and on the evening in question he asked witness if he was going over on the west side, and when witness said yes, Morgan got in and rode over with him; that Raser also asked permission to go, and witness took him over. Morgan and Raser both lived on the east side, and usually took the car for their homes on that side, although Morgan sometimes took the trolley on the west side. Morgan testified that he was foreman of the work and had been in charge about a week; that the crew quit work at Thirty-ninth Street at about a quarter of 6 o'clock; that he asked Mr. Brown if he

was going to town, and he said yes, and witness then asked him if he could ride with him, and Brown said all right; that Raser was inside the wagon, and also came along; that witness had some shopping to do at the butcher-shop and grocery store on the west side; that he had no company business on the west side, and that the proper way for him to have gone home from his work was to have taken a car at Hawthorne Avenue and Thirty-ninth Street, about five blocks from the place where the crew were when they ceased work for the day; that he did not come over on the west side to catch a car home; that he reported the accident to his company next morning because it was his duty to do so; that Mr. Brown had reported it, and they asked witness how it was, and he told them. Raser testified that he went over to look at a pair of shoes on the west side; that he lived at St. Johns on the east side. Upon the close of the testimony defendant moved for a directed verdict, but the motion was denied. Upon the argument counsel for plaintiff severely attacked several of defendant's witnesses, and his alleged intemperate language was objected to and is alleged here as one of the reasons why this cause should be reversed. The plaintiff had a verdict and judgment, and defendant appeals. AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Messrs. Wood, Montague & Hunt* and *Mr. M. M. Matthiessen*, with an oral argument by *Mr. Richard W. Montague*.

For respondent there was a brief over the name of *Messrs. Davis & Farrell*, with an oral argument by *Mr. Wilfred E. Farrell*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Only two questions are presented on this appeal; the first being as to the sufficiency of the testimony to justify a verdict for plaintiff, and the second, the strictures of plaintiff's counsel during the argument.

1. It is clearly shown that the defendant was the owner of the automobile; that the driver was a person regularly employed by it to drive it, and that the accident happened through his negligence. These facts being shown, the plaintiff contended in the court below, and contends here, that a presumption arose that the driver was using the automobile in the company's business, which authorized the jury to find for the plaintiff under the rule of *respondeat superior*, notwithstanding the testimony of the defendant's witnesses that the machine was being used by them upon their private business without permission of the company. It has been frequently held by the courts that where an automobile is operated by a person employed for that purpose, it will be presumed that he is acting within the scope of his authority and about his employer's business. If he is not so operating it, this is a fact peculiarly within the knowledge of the employer, and the burden is upon him to overthrow this presumption by evidence of which the law presumes he is in possession: *Huddy, Automobiles* (3 ed.), § 281; *Long v. Nute*, 123 Mo. App. 204 (100 S. W. 511); *Moon v. Matthews*, 227 Pa. 488 (76 Atl. 219, 136 Am. St. Rep. 902, 29 L. R. A. (N. S.) 856); *Ludberg v. Barghoorn*, 73 Wash. 476 (131 Pac. 1165); *Purdy v. Sherman*, 74 Wash. 309 (133 Pac. 440); *Birch v. Abercrombie*, 74 Wash. 486 (133 Pac. 1020, 50 L. R. A. (N. S.) 59); *Langworthy v. Owens*, 116 Minn. 342 (133 N. W. 867). By the

terms, "raises a presumption," "will be presumed," and other similar language used in the decisions above cited, it is evident it is not meant that the circumstances of the use or possession of an automobile by an employee of the owner raises any presumption of law that the person in charge of it is using it upon the business of the master, but rather that such facts are sufficient to justify a jury in inferring that such is the case; in other words, the fact that a person is in possession of the automobile of another, and the additional fact that he is shown to have been employed by the owner to drive and care for it, taken together, form a chain of circumstantial evidence from which a jury is authorized to infer the further fact that the employee is using the machine upon the employer's business. This being the case, the owner is called upon to rebut the evidence of these circumstances by showing, by testimony satisfactory to the jury, that the real fact is otherwise; that notwithstanding the testimony introduced by plaintiff presents those circumstances which usually justify the inference that the machine is being used for his business and by his authority, the actual fact is that the employee is not so using the machine, but is taking it in connection with his own business and in performance of errands not connected with his employment. The inference to be drawn from the facts shown by the testimony adduced on behalf of plaintiff is similar in principle and effect to that arising from evidence of the recent possession of stolen property, which it is said presents an evidential fact to be considered by the jury with other facts shown in the case in determining the guilt or innocence of the accused: *State v. Pomeroy*, 30 Or. 16 (46 Pac. 797).

2. We are of the opinion that the testimony introduced by plaintiff tended circumstantially to prove

that the automobile was being used by defendant's employee upon defendant's business. This being the case, the relative weight of the testimony introduced by the defendant to explain away these circumstances was a matter solely for the jury. It is observed by Mr. Justice STRAHAN, in *State v. Jones*, 18 Or. 261 (22 Pac. 842):

"As soon as enough is shown to require the defendant to enter upon his defense, and to introduce evidence, it is the province of the jury to weigh the evidence, and pass upon the credibility of the witnesses."

This appears to have been the view taken by many courts, even in jurisdictions where the power of the court to consider the relative weight of testimony is not so restricted as it has been, since the Constitution was amended in 1910 by the adoption of Article VII, Section 3. Thus, in *Langworthy v. Owens*, 116 Minn. 342 (133 N. W. 867), the court, referring to similar testimony in a case resembling the one at bar, says:

"There was direct evidence tending to establish the claim that Rogers was not the agent; but upon examination of the whole evidence we are of the opinion that it was not conclusive as a matter of law, and that the cause should have been submitted to the jury."

In *Purdy v. Sherman*, 74 Wash. 309 (133 Pac. 440), Mr. Justice CHADWICK says:

"The evidence offered by defendant might have sustained a verdict in his favor, but under repeated decisions of this court the jury was not bound to believe such testimony; the ownership of the automobile being admitted to be in the defendant: * * *Knust v. Bullock*, 59 Wash. 141 (109 Pac. 329); *Kneff v. Sanford*, 63 Wash. 503 (115 Pac. 1040); *Burger v. Taxicab Motor Co.*, 66 Wash. 676 (120 Pac. 519). Whether the *prima facie* case made by the respondent was overcome was

a question for the jury, and it has decided that it was not."

And in the case of *Knust v. Bullock*, 59 Wash. 141 (109 Pac. 329), Mr. Justice MOUNT says:

"In cases of this kind, where it is shown that the wagon and team doing damage belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the wagon and team were in possession of the owner, and that whoever was driving it was doing so for the owner: *Edgeworth v. Wood*, 58 N. J. Law, 463 (33 Atl. 940); *Schulte v. Holliday*, 54 Mich. 73 (19 N. W. 752); *Norris v. Kohler*, 41 N. Y. 42; *Seaman v. Koehler*, 122 N. Y. 646 (25 N. E. 353). This being the rule, it is plain that the plaintiff made a case for the jury, and that the court did not err in refusing to direct a verdict in favor of the defendants."

To the same effect see *Geiselman v. Schmidt*, 106 Md. 580 (68 Atl. 202); *Baldwin v. Abraham*, 57 App. Div. 67 (67 N. Y. Supp. 1079). Whatever may be the rule in those jurisdictions where courts are permitted to set aside verdicts deemed contrary to the weight of evidence, we consider ourselves precluded from doing so by that clause in Article VII, Section 3, of our amended Constitution, which provides:

"No fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

3, 4. The second point presented by defendant's counsel relates to the argument of counsel for plaintiff before the jury. The objectionable remarks as shown by the bill of exceptions are as follows:

"Their only object is to keep from paying this man what he is entitled to. They go out and pick up the best lawyers they can get to try to keep this man from getting justice. I say they did maim him, and I say it

is a shame and an outrage for them to come here and try to say they didn't, and you, gentlemen, all I ask you to do is to put yourself in that man's place, if you can, sitting here for a part of three days, like this man, and going to a sick-bed like he did, put yourself in his place; that is all I ask you to do. You are not here representing the Home Telephone Company, and you are not here representing this man, and you are not here to be biased or prejudiced in any way. Take all the facts and surrounding circumstances, and the way they come in here and twist and try to distort this case, and see what chance you would have at the hands of these people. That is all I ask you to do. Do unto this man as you would be done by. That is the theory we should go on in this world if we expect to find happiness. It is all right for Mr. Montague to try to beat this man out of his just deserts if he can."

To these statements defendant objected on the ground that they were prejudicial, improper and misconduct. To the overruling of this objection defendant excepted, and an exception was allowed by the court.

"You can say what you want to about the case not being cooked up, but I am going to say that it is cooked up, whether Mr. Montague likes it or not. How ridiculous it was that every man there had an errand on this side of the river, to keep from being in the employ of the company, a man living out at St. Johns, ordinarily takes an hour to go home, and he comes clear over on this side of the river because it was handier for him to take a car and sit down and let some poor working man stand up; that is the size of it. I know these fellows. A man who will come in and testify against his fellow-citizen like that, I say is devoid of principle.

"Mr. Montague: I object to these remarks, your Honor.

"The Court: Yes, that is incompetent.

"Mr. Davis: I am saying this man came over here because it was handier for him to take a car over there.

"The Court: There is no objection to that.

"Mr. Montague: That is not what I objected to.

"The Court: Go ahead.

"A. If I have been unfair in this thing I want to apologize to you gentlemen and to the court, and if I have been unfair in a righteous cause, and when I look over the slick, well-fed manager of the company, Mr. Middleton, I am wondering if he will ever be called on to come into the court and get what is his right and just dues. I am not religious, I am not a member of any church, but I did receive a few instructions as a boy, and as I grew older—it may be because my mother was religious—I have always tried to follow the golden rule, and I am going to repeat it, not for Mr. Montague's benefit, because I think he is familiar with it, 'Whatsoever you would that men should do unto you, do you also unto them.' That is Christ's golden rule; that is not the lawyer's golden rule, but that is Christ's golden rule, and he says he was sent on earth to preach the gospel to the poor. They were the ones that needed his protection, not Mr. Montague or Mr. Middleton, or that class of people; they don't need it; that is just exactly the situation."

To these remarks the defendant objected on the ground that they were an appeal to class prejudice, and this objection was sustained by the court. While the remarks covered by the first objection of counsel for defendant were vehement and, perhaps, unnecessarily severe, we cannot say as a matter of law that there was not some basis for them in the testimony. At all events they did not go beyond the very common measure of denunciation indulged in by attorneys in the heat of argument. The objection to the remarks embraced in the second exception on this subject was sustained by the court, and there the matter rested; counsel for defendant taking no exception to the ruling of the court and not asking the court to direct the jury to disregard the remarks to which they objected.

5. Further remarks of counsel for plaintiff along the same line appear in the transcript of testimony, but, not being made part of the bill of exceptions, will not be considered here.

While it must be conceded that the testimony introduced by defendant was strong and, in the judgment of the writer, tended greatly to discredit plaintiff's theory of the case, we feel ourselves precluded by the law from disturbing the finding of a jury upon testimony the value and effect of which it was their exclusive province to determine.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

**MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and
MR. JUSTICE BENSON concur.**

On motion to dismiss appeal, argued January 13, denied January 26, 1915.

On the merits argued October 5, reversed November 9, rehearing denied December 7, 1915.

STATE EX REL. v. RIDER.

(145 Pac. 1056; 152 Pac. 497.)

Contempt—Appeal—Bill of Exceptions.

1. Whether a sentence for contempt exceeds the limits fixed by statute, being determinable from an examination of the judgment as exemplified in the record, may be submitted on appeal without a bill of exceptions, even though other questions discussed in the brief could not be considered without the evidence and a bill of exceptions.

Contempt—Appeal—Record—Additional Abstract.

2. Where respondent deems the abstract imperfect or unfair, he should file an additional abstract, as prescribed by Supreme Court Rule 7 (56 Or. 616 [117 Pac. x]).

Contempt—Appeal—Assignments of Error—Sufficiency.

3. That assignments of error in the abstract on appeal fall short of technical accuracy does not require a dismissal of the appeal, not essential to a transfer of the cause.

Contempt—Appeal—Transcript—Authentication.

4. Where defendant has attempted in good faith to comply with Laws of 1913, page 656, declaring that when an appeal is perfected the original pleadings and the original bill of exceptions shall be sent up by the clerk of the trial court and made a part of the transcript, he will be allowed to supply a certificate to meet the objection that the pleadings and papers sent up were not properly authenticated.

ON THE MERITS.**Appeal and Error—Record—Certification.**

5. Documents not certified by the judge as having been received or offered in evidence at the trial cannot be considered on appeal, though certified by the clerk below and filed in the appellate court.

Appeal and Error—Record—Questions Presented.

6. In the absence of a bill of exceptions, the only question to be considered on appeal is whether the findings of fact support the judgment.

Justices of the Peace — Supplementary Proceedings — Disobedience of Order—Punishment—Proceedings.

7. Where a judgment debtor is discharged, in proceedings for contempt before a justice of the peace in not paying over, as ordered, money found to be in his possession in supplementary proceedings, and the judgment creditor appeals to the Circuit Court, the burden is on the creditor to show that the money is still in the debtor's possession; there being no presumption thereof.

[As to courts and tribunals authorized to punish for contempt, see note in 117 Am. St. Rep. 950.]

From Marion: PERCY R. KELLY, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is a motion to dismiss an appeal from the judgment of the Circuit Court of Marion County finding the defendant guilty of contempt. The reasons assigned in the motion are that: (1) No bill of exceptions was allowed or filed; (2) the evidence has not been brought before this court; (3) the abstract filed herein is insufficient because the affidavit for contempt on which the judgment was based is not set forth in full, the findings of fact are only partially recited, and the conclusions of law are omitted; (4) there are no assignments of error which could be determined on appeal; and (5) the notice of appeal was not served on the district attorney or other officer of the State

of Oregon. The transcript filed includes copies of the judgment, notice of appeal showing acceptance of service by both the district attorney and the attorney for the relator, and the undertaking on appeal. There are, in the hands of the clerk of this court, what purport to be papers filed in the Justice Court, where the contempt proceeding originated, and also what appear to be papers filed in the Circuit Court. There is no bill of exceptions. The objections will be considered in the order already stated. **MOTION DENIED.**

Mr. Ernest R. Ringo, District Attorney, and *Messrs. McNary, Smith & Shields*, for the motion.

Mr. Ivan G. Martin and *Mr. Carey F. Martin*, *contra*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. One of the questions sought to be determined by this appeal is whether the sentence imposed by the court exceeds the limits fixed by statute. An examination of the judgment, as we find it exemplified in the record, will reveal a recital of sufficient facts to enable a decision of the point raised. At least one phase of the case can be submitted on appeal without the presence of a bill of exceptions, and even though other questions discussed in the brief could not be considered without the evidence and a bill of exceptions.

2. If plaintiff deemed the abstract imperfect or unfair, an additional abstract could have been filed as provided by Rule 7, 56 Or. 616 (117 Pac. x); *Francis v. Bohart*, 76 Or. 1 (143 Pac. 920).

3. The assignments of error as set forth in the abstract are sufficient; and, even if they fell short of

technical accuracy, the rule in *Proctor v. Jeffery*, 76 Or. 151 (144 Pac. 1192), would apply.

The objection that the district attorney was not served with the notice of appeal is answered by the fact that the record shows that he admitted service.

4. The defendant has attempted in good faith to comply with the provisions of Chapter 335 of the Laws of 1913, and has caused to be sent to the clerk of this court, not only all the pleadings, but also all the original papers filed in the case. Objection has been made to these pleadings and papers because not properly authenticated, and defendant, therefore, has requested permission to supply a certificate that will meet the objection made. The request of defendant is granted.

“While vexatious appeals should be discouraged, yet the opportunity for litigants to have their issues tried in the higher courts should not be hindered by technical constructions, which too frequently lead to the subversion of justice: *Smith v. Algona Lumber Co.*, 73 Or. 1 (136 Pac. 7).

The motion to dismiss the appeal is denied.

MOTION DENIED.

Reversed November 9, rehearing denied December 7, 1915.

ON THE MERITS.

(152 Pac. 497.)

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This proceeding was commenced in the Justice's Court of Salem district by the State of Oregon, on the relation of T. E. Mitchell, against U. S. Rider, to

punish the latter for a contempt for disobedience of an order for the payment of money. The affidavit initiating the proceedings is to the effect that the relator duly secured in that court, on March 14, 1913, a judgment against the defendant for \$41.55 the amount of a promissory note, \$25 as attorney's fees, and \$7.65, costs and disbursements; that, based thereon, an execution was issued and returned *nulla bona*, whereupon supplemental proceedings were begun in that court against the defendant, who, appearing December 2, 1913, was examined on oath concerning his property, and the justice, having found that he then possessed \$50 in money, made an order directing him to pay that sum on the judgment within 48 hours from December 4, 1913, at 2:30 P. M., the time when a copy of the order was personally served upon him; and that such order remains in full force, but has never been complied with by the defendant, who by reason of his disobedience is in contempt. The defendant personally appearing in a contempt proceeding was, after a hearing, found not guilty, and thereupon discharged January 10, 1914. From that determination the relator appealed to the Circuit Court for Marion County where the cause was tried October 2, 1914, and findings of fact and of law were made as set forth in the affidavit. One of the findings, relating to the original command of the Justice's Court to pay the specified sum of money, reads:

"That no evidence has been offered nor any reason shown by the defendant tending to excuse him for failure to comply with the last-mentioned order."

Predicated on such findings, it was determined that the defendant was guilty of contempt and should be imprisoned in the jail of that county until he complied with the order of the Justice's Court by paying the

sum of money specified. From the latter judgment, the defendant appeals to this court.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Carey F. Martin* and *Mr. Ivan G. Martin*, with an oral argument by *Mr. Carey F. Martin*.

For the State there was a brief over the names of *Mr. Ernest R. Ringo* and *Messrs. McNary, Smith & Shields*, with an oral argument by *Mr. Roy F. Shields*.

Opinion by MR. CHIEF JUSTICE MOORE.

5. No bill of exceptions has been settled or allowed in this cause. There have been filed with our clerk, however, the defendant's affidavit as to what testimony he gave in the Circuit Court, and also the original pleadings in the Justice's Court, together with a transcript of the orders made thereon and certified to by the justice, which papers were filed with the clerk of the Circuit Court and are certified to by him. None of these papers has been identified by the trial judge as having been received or offered in evidence, and for that reason they are not properly before us for review: *State v. Kline*, 50 Or. 426 (93 Pac. 237); *Multnomah L. Co. v. Weston Basket Co.*, 54 Or. 22 (99 Pac. 1046, 102 Pac. 1); *State v. Martin*, 54 Or. 403 (100 Pac. 1106, 103 Pac. 512); *Keady v. United Railways Co.*, 57 Or. 325 (100 Pac. 658, 108 Pac. 197).

In the absence of a bill of exceptions in an action at law, the only question to be considered is whether or not the findings of fact support the judgment: *Noland v. Bull*, 24 Or. 479 (33 Pac. 983); *Allen v. Leavens*, 26 Or. 164 (37 Pac. 488, 46 Am. St. Rep. 613, 26 L. R. A. 620); *Richardson v. Dunlap*, 26 Or. 270 (38 Pac. 1);

Miller v. Head Camp, 45 Or. 192 (77 Pac. 83); *Lewis v. Clark*, 66 Or. 461 (134 Pac. 1194). Upon an appeal from the judgment of a Justice's Court, the action must be tried anew in the Circuit Court: Section 556, L. O. L.

6. From the findings of fact hereinbefore quoted it would seem that the presumption was invoked that a thing once proved to exist continues as long as is usual with things of that nature: *Id.*, § 799, subd. 33. Predicated on this deduction which the law expressly directs to be made from particular facts, it was evidently determined that, because the defendant had not offered any testimony or given any reason tending to explain his failure to comply with the order of the Justice's Court of December 2, 1913, to pay on account of the judgment \$50, which sum it was then found he had, he retained possession thereof October 2, 1914, when the cause was tried in the Circuit Court.

In *Hammer v. Downing*, 41 Or. 234 (66 Pac. 916), an order issued in supplementary proceedings required defendant to apply a sum of money to the satisfaction of a judgment. The referee in such proceedings found that on a date more than three months prior thereto the defendant had in his possession the necessary money, and that, no evidence having been offered tending to prove that he had paid out any of the money, he was therefore still the owner and in possession thereof. The court in that case held that the presumption relied upon to sustain the final order was insufficient saying:

“As the judgment debtor's failure to apply property found in his possession or under his control to the satisfaction of a judgment in proceedings supplemental to execution renders him liable to be punished as for a contempt of court (*Hill's Ann. Laws 1887*, § 310), the proof of such possession ought to be con-

clusively established by the weight of the testimony given at such examination, and not deduced from disputable presumptions."

If the \$50 in question had been received by the defendant for the relator, as if it had been collected by an officer of the court, so that an obligation to pay it over to the party entitled thereto resulted from the mere possession, the presumption referred to might properly be indulged; for any other deduction would necessarily make a sequestration of the money a violation of the trust. What time elapsed after January 10, 1914, when the defendant was found not guilty of contempt and discharged by the Justice's Court, before an appeal from that judgment was taken to the Circuit Court, is not disclosed by the transcript properly before us. An appeal from a justice's decision may be taken by giving oral notice in open court at the time the judgment is rendered or within 30 days thereafter by serving on the adverse party a written notice and filing the original with proof of service indorsed thereon: Section 2457, L. O. L. It is possible the defendant, relying upon the order of the Justice's Court finding him not guilty and dismissing the proceedings, may have paid out the money before the appeal was taken. In view of that possibility, and as the case was tried anew in the Circuit Court, it was incumbent upon the relator to offer testimony affirmatively tending to prove that the defendant, on October 2, 1914, was then possessed of the \$50, and could have complied with the order to pay that sum on account of the judgment and to have secured a finding of fact to that effect before the defendant could have been incarcerated in jail for a failure to comply with the command to make the payment: *Ex parte Joutsen*, 154 Cal. 540 (98 Pac. 391).

The findings do not support the judgment, and, such being the case, the final determination of the Circuit Court is reversed and the cause remanded for a new trial.

REVERSED. REHEARING DENIED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE concur.

Argued October 28, modified December 7, 1915.

McHARGUE v. CALCHINA.

(153 Pac. 99.)

Trespass—Realty—Damages—Statute.

1. Under Section 346, L. O. L., making any person, cutting or carrying off trees from the land of another without lawful authority, liable for treble the damages claimed or assessed therefor, the cutting or removal, if accidental, permits a recovery of only actual damages, but, if willful, is ground for the recovery of treble damages.

[As to statutory penalties for cutting, destroying or carrying away timber, see note in 1 Am. St. Rep. 496.]

Pleading—Sufficiency of Complaint—Aider by Verdict.

2. Under such provision, a complaint alleging that defendant unlawfully went on plaintiff's land and cut and removed trees, but not alleging that such acts were done willfully or intentionally, not challenged by a demurrer, was sufficient after verdict, as a verdict, while not supplying a material averment, will cure a defective statement.

Pleading—Liberal Construction.

3. A complaint, not challenged by demurrer, should be liberally construed.

Trial—Motion for Directed Verdict—Construction as Motion for Nonsuit.

4. Where the complaint alleged defendant's unlawful cutting and removal of trees from plaintiff's land, entitled plaintiff, under Sec. 346, L. O. L., to treble damages, and for a second cause of action alleged that defendant, before his warranty deed to plaintiff, had conveyed a strip out of the land by warranty deed, and had induced plaintiff to believe that a dwelling was wholly on the premises to be conveyed to him, when in fact it was not, and its removal would cost \$100, and the answer denied each averment of the complaint and alleged that the strip was used as a public highway, defendant's motion for a directed verdict, because of plaintiff's failure to offer evidence sufficient to constitute his causes of action, would be treated as an application for a judgment of nonsuit.

Appeal and Error—Modification of Judgment.

5. Under Section 346, L. O. L., making one cutting or carrying off trees from the land of another without lawful authority liable for treble the amount of damages claimed or assessed, the burden was on plaintiff to prove the willfulness of the trespass, and to show by a preponderance of the evidence that all sums in excess of the actual damages were recoverable, and where there was no proof of the trespass, except as it might be inferred from his ownership of the premises and the cutting and removal, a judgment for treble damages would be remitted.

Trespass—Realty—Presumption—Rebuttal.

6. In such case, a presumption of an unintentional trespass would arise from a vendor's cutting and removing of trees after his conveyance without reservation, which in an action for the trespass he could rebut only by allegation and proof of some license or authority exempting him from liability.

Covenants—Breach of Warranty—Area of Premises.

7. A grantor by warranty deed, who had previously conveyed a strip over the granted premises, used as a county highway, was liable for a breach of his covenant of general warranty.

Covenants—Breach of Warranty—Damages.

8. In such case, where the grantee sustained a substantial loss in area by reason of an easement of a public way through the premises conveyed, the detriment was sufficient to authorize his recovery of more than nominal damages.

Highways—Easement—Reverter.

9. A county, using a strip of another's land as a public highway, thereby obtained only an easement, the fee remaining in the owner; and on abandonment of the highway the owner, or his heirs and assigns, would take discharged of the easement.

[As to highways established by prescription, see note in 57 Am. St. Rep. 744.]

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by J. H. McHargue against Alex Calchina and was commenced in a Justice's Court of Union County.

The complaint alleges, in effect, that on February 25, 1914, the defendant, by a general warranty deed sold and conveyed to the plaintiff the west $\frac{1}{2}$ of the southeast $\frac{1}{4}$, and the southwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of section 15, in township 2 south, range 37 east of the Willamette Meridian, at the agreed price of \$35

per acre, of which premises the plaintiff has ever since been, and now is, the owner and in the possession thereof, except a strip 20 feet wide off the east side thereof; that about March 6, 1914, the defendant, without license or authority, went upon the plaintiff's land and unlawfully cut down and removed two pine trees then growing thereon, and appropriated the logs to his own use, to plaintiff's loss in the sum of \$6, whereby he is entitled, under Section 346, L. O. L., to treble damages. For a second cause of action it is averred, in substance, that long prior to February 25, 1914, the defendant, by warranty deed then duly recorded, sold and conveyed to J. A. Russell such 20-foot strip, containing 1.8 acres, of the value of \$65; that upon the real property first described is a dwelling, 24 feet square, which the defendant, at the time of such purchase, caused the plaintiff to believe was wholly upon the premises intended to be conveyed, but that 8 feet of the structure extends upon such strip, and that to remove it therefrom will cost \$100. Judgment is demanded for these several sums.

Each averment of the complaint is denied by the answer except as thereafter admitted. For a separate defense to the second cause of action a conveyance of the land to the plaintiff is conceded by the answer, which avers, in effect, that at and prior to the time of such grant there was and now is a county road, open, visible and notorious, extending along the specified strip that was conveyed to J. A. Russell, which narrow tract, long prior to February 25, 1914, had been regularly dedicated to and appropriated by Union County and used by it as a public highway.

The defendant secured in the Justice's Court a judgment in his favor, and the plaintiff appealed. The cause was retried in the Circuit Court, where the jury

returned special verdicts finding the value of the trees taken to be \$3.62; the worth of the 20-foot strip, \$30.14; and the cost of moving the house, \$14. From a judgment, rendered on these verdicts, for three times the value of the trees, and for the other items as found, the defendant appeals to this court. **MODIFIED.**

For appellant there was a brief and an oral argument by *Mr. R. J. Green*.

For respondent there was a brief and an oral argument by *Mr. John P. Rusk*.

Opinion by MR. CHIEF JUSTICE MOORE.

After the plaintiff had introduced his evidence in chief and rested, a motion for a directed verdict for the defendant, on account of an alleged failure to establish the averments of the first or second cause of action, was interposed and denied. When the cause was submitted the defendant's counsel again moved for a directed verdict for his client, on the grounds: (1) That the complaint did not state facts sufficient to constitute the first cause of action; (2) that no evidence had been received to establish the averments thereof; (3) that the complaint did not state facts sufficient to constitute the second cause of action; (4) that the uncontradicted testimony shows the plaintiff had never been evicted, and hence he was entitled to nominal damages only by reason of the existence of the road, or by the house being partly thereon; (5) that the testimony conclusively shows that plaintiff received and now holds possession of the granted premises, and had not been damaged in any sum whatever; and (6) that the land so conveyed contains more than 120 acres.

This motion was also denied, and it is contended that errors were thereby committed.

1-3. It is argued by defendant's counsel that it was incumbent upon the plaintiff to allege, in the first cause of action, that the trees were taken willfully and without lawful authority, and to have offered competent testimony to substantiate such averments, but, having failed to do so, the motions referred to should have been granted. Section 346, L. O. L., as far as involved herein, reads:

“Whenever any person shall cut down * * or carry off any tree * * on the land of another person * * without lawful authority, in an action by such person * * against the person committing such trespasses, * * if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed therefor, as the case may be.”

In construing this enactment it was held that a special finding by a jury that the defendant took and carried away wood and timber unlawfully entitled the plaintiffs to treble damages, though a further finding was made that the defendants had reasonable cause to believe, and did believe, they had authority from the plaintiffs so to take and remove the wood and timber: *Loewenberg v. Rosenthal*, 18 Or. 178 (22 Pac. 601). A later decision has modified that harsh rule, and it is now settled that, when the cutting on or the removal from the land of another is accidental or independent of volition, the actual damage inflicted is the measure of the recovery, but when such trespass is willful treble damages may be obtained by an action at law: *Oregon etc. R. Co. v. Jackson*, 21 Or. 360 (28 Pac. 74). The adverbs “wrongfully and unlawfully” are the only limiting words employed in the complaint herein to qualify the act of cutting and removing the

trees. It is believed that the expression "willfully" or the word "intentionally," as indicated in the second case cited, should have been used in the complaint to restrict such cutting and removal in order to be entitled to recover treble damages.

As the sufficiency of the complaint was not challenged by a demurrer, the initiatory pleading should be liberally construed, and, though a verdict will not supply a material averment, it will cure a defective statement: *Davis v. Mitchell*, 72 Or. 165, 175 (142 Pac. 788), and cases there cited. The complaint as to the first cause of action is sufficient under the circumstances mentioned.

4, 5. In discussing the subject of trespass and the remedy given by statute to recover treble damages for an injury to real property, an author remarks:

"The burden of proof is on plaintiff to prove the elements of the trespass, including his title, the willfulness of the act, and that it was without his consent": 38 Cyc. 1170.

Evidence was received at the trial in the Circuit Court tending to show that the defendant cut and caused to be removed the two trees, and to substantiate the reasonable value thereof; but the plaintiff offered no testimony whatever to establish the willfulness of the trespass, or that it was committed without his consent. The plaintiff's counsel insists that the first motion for a directed verdict did not sufficiently specify the grounds upon which it was predicated, and, this being so, no error was committed in denying the application. This motion will be treated as an application for a judgment of nonsuit. In *Hammer v. Campbell Gas Burner Co.*, 74 Or. 126 (144 Pac. 396), it was maintained that an error was committed in refusing to grant a judgment of nonsuit. The bill of exceptions there

showed that plaintiff rested, and "thereupon defendant moved for judgment, which motion was overruled, and defendant allowed an exception."

It was held in that case that as the motion did not ask for a nonsuit, or specify the grounds upon which the application was based, it was insufficient, and raised no question for review. In the case at bar the first motion interposed specified that the ruling desired was based upon the alleged failure of the plaintiff to introduce evidence sufficient to constitute the first or second cause of action. The controverted averments of the complaint showed what facts the plaintiff was required to prove, and when the first motion pointed out that there had been a failure to substantiate such issues the attention of the court was called to the particular defect relied upon.

Treble damages, given by statute for a willful trespass upon realty, are punitive in character. The value of the property injured or destroyed affords indemnity. Whatever additional sum is imposed is in the nature of a penalty, and before it is inflicted in a civil action, the preponderance of the evidence should show that all sums in excess of the actual damages inflicted were properly recoverable under the terms of the enactment. In the case at bar, it will be remembered that the jury found the value of the trees so cut and removed to be \$3.62. The judgment rendered on this special verdict was for the recovery of \$10.86, or \$7.24 more than the actual value of the timber taken. No testimony was offered by the defendant tending to show that any license had been granted him to cut or remove the trees, nor was there any proof of a trespass, except so far as it might be inferred from the plaintiff's ownership of the premises and the cutting and removal of the logs. The burden of proof being

on the plaintiff to establish the elements of the trespass, the willfulness of the act, and that it was without his consent, he signally failed to make out a case sufficient in these particulars to be submitted to the jury. The defect in the testimony was called to the attention of the court in such a manner as to make a denial of the first motion erroneous, so far as it related to the first cause of action. The judgment for the penalty is for a small sum; but as the trespass alleged to have been committed in cutting and removing the trees has not been established with that degree of proof required to authorize the recovery of treble damages, the excess of \$7.24 must be remitted.

6. A presumption of an unintentional trespass ought to arise from a vendor's cutting and removing timber after he has conveyed, without reservation, the land upon which the trees grew. If he desires to rebut such deduction, it is incumbent upon him, when charged in a complaint in a civil action with a commission of the act, to allege in his answer and to prove at the trial some license or authority in the exercise of which he is exempt from liability: 38 Cyc. 1170. Not having done so, the defendant is properly chargeable with the sum of \$3.62, the actual value of the trees as found by the special verdict.

7-9. The defendant's prior conveyance to J. A. Russell of a strip of land, though such narrow tract was dedicated to and appropriated by Union County as a public highway, diminished the area of the premises described in the deed delivered to the plaintiff, whereby he was damaged in the sum of \$30.14, as found by the jury. That such strip was being used as a public road when the plaintiff examined the premises with a view of securing a title thereto is of no consequence, for only

an easement was obtained by the county, the fee remaining in Russell, and if the highway be abandoned he, or his heirs or assigns, will be restored to the original estate: *Lankin v. Terwilliger*, 22 Or. 97 (29 Pac. 268); *Huddleston v. Eugene*, 34 Or. 343 (55 Pac. 868, 43 L. R. A. 444); *John P. Sharkey Co. v. City of Portland*, 58 Or. 353 (106 Pac. 331, 114 Pac. 933).

Not having reserved such strip when the warranty deed was executed for the entire tract, the defendant is liable for a breach of the covenant of general warranty, for the plaintiff never secured possession of any of the highway, except that part which was encroached upon by the dwelling. Where a substantial loss has been sustained, other than an outstanding paramount title, such detriment is sufficient to authorize a recovery of more than nominal damages: *Webb v. Wheeler*, 80 Neb. 438 (114 N. W. 636, 17 L. R. A. (N. S.) 1178, and note at page 1185). The fee conveyed to Russell was a substantial loss to a part of the premises attempted to be conveyed to the plaintiff, and it is unimportant whether or not the land described in his deed actually contained more or less than 120 acres. Except for the premises embraced in the Russell deed, the plaintiff took title to the entire tract described in his deed, as laid out by authority of the surveyor general. The area of such realty is to be determined in the manner prescribed for ascertaining the contents of sections like that in the case at bar, which do not border on the north or west lines of a township.

The plaintiff has not been evicted from the dwelling, but he has sustained substantial loss by its encroachment upon the highway, and for that reason is entitled to the damages awarded on account of the road and the house.

The judgment will therefore be modified, by eliminating from the total award \$7.24, the amount of the treble damages, and in all other respects affirmed.

MODIFIED.

MR. JUSTICE BEAN and MR. JUSTICE MCBRIDE concur.

MR. JUSTICE HARRIS concurs in the result.

MR. JUSTICE BURNETT delivered the following dissenting opinion:

Section 346, L. O. L., establishes a remedy for anyone aggrieved within its terms as follows:

“Whenever any person shall cut down, girdle, or otherwise injure, or carry off, any tree, timber, or shrub on the land of another person, or on the street or highway in front of any person’s house, village, town, or city lot, or cultivated grounds, or on the commons or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, or city, against the person committing such trespasses, or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed therefor, as the case may be.”

The following section provides for a defense in the nature of mitigation of damages thus:

“If, upon the trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.”

It will be observed that the section first quoted does not contain the term "willful," or any other word indicating a requisite intent. While it is a standard rule that laws imposing a penalty must be construed strictly, it is equally well settled that we cannot import any additional terms into such a statute. There is testimony in the record in this case competent to go to the jury as tending to show that the defendant cut the trees on the land of another, as stated in the complaint. The pleading alleges the act within the terms of the statute, and there is evidence supporting the charge as laid; hence the case was properly submitted to the jury on that point.

It is not necessary to anticipate or negative a possible defense either in pleading or in proving. Consequently it would be superfluous for the plaintiff to state that the trespass was willful, or that it was done without his consent, or to offer testimony in chief on those points. It is enough for the plaintiff to show the act of the defendant in cutting down trees on the former's land. If the defendant would escape the treble damages by reason of his trespass being involuntary, or, in other words, an unconscious act on his part, he must properly plead that element, and then prove it, if traversed. Any conscious act of a person may be properly said to have been done willfully. The word is defined thus in Section 2393, L. O. L.:

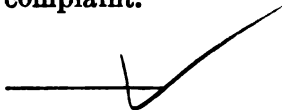
"The term 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or omission referred to, and does not require any intent to violate law, to injure another, or to acquire any advantage."

It must not be confounded with the word "wantonly" the meaning of which is given in Section 2398, L. O. L.:

“The term ‘wantonly,’ when applied to the commission of an act, implies that the act was done with a purpose to injure or destroy without cause and without reference to any particular person.”

The lexicographers attach substantially the same signification to these words when used in the legal sense. It follows that if the defendant, as stated in the complaint and as the evidence tends to prove, went upon the plaintiff's land and cut down and carried away timber standing thereon, he came within the terms of the statute defining the cause of action, incurring the consequence of treble damages. If the act was casual or involuntary, or if he had probable cause to believe that the land whereon the trees stood was his own, it was matter of defense which he should have pleaded.

For these reasons I dissent from the portion of the opinion by Mr. Chief Justice MOORE in this case, denying treble damages in favor of the plaintiff for the trespass described in his complaint.



Argued October 28, affirmed December 7, 1915.

GOFF v. KELSEY.*

(153 Pac. 103.)

Specific Performance—Oral Contract—Weight and Sufficiency of Evidence.

1. In an action for the specific performance of an alleged oral contract for the sale of land, the terms of the agreement must be shown by full, complete and satisfactory proof; but proof beyond a reasonable doubt is not required.

*On sufficiency of possession alone as ground for granting specific performance of parol gift of or contract to convey real property, see note in 8 L. E. A. (N. S.) 870.

REPORTER.

Frauds, Statute of—Interest in Land—Relationship.

2. Under an oral contract to sell an interest in land to a son-in-law, proof of his possession under such contract was not enough, of itself, to avoid the statute of frauds as between relatives.

Specific Performance—Contracts Enforceable—Possession and Improvement.

3. In such case, where the son-in-law took possession of the premises with the intention of carrying out the contract, and, because of the contract, made valuable permanent improvements, a court of equity would be warranted in enforcing the contract.

[As to what amount to contracts for the sale of land within the statute of frauds, see note in '102 Am. St. Rep. 230.]

Evidence—Declarations Against Interest—Statute.

4. In an action for the specific performance of an alleged oral contract to convey land brought against the vendor's executrix, declarations of the deceased vendor against his interest were admissible under the express provisions of Section 710 and Section 727, subdivision 4, L. O. L.

Evidence—Self-serving Declarations—Statute—"Party."

5. Under Section 732, subdivision 2, L. O. L., providing that when a party to action by or against an executor or administrator offers declarations by the deceased against his interest, declarations of the deceased as to the same subject matter in his own favor may also be shown, an executrix of an alleged vendor who, in an action for specific performance of an oral contract to convey, was impleaded as a party defendant, and who by Section 1185, L. O. L., was entitled to the possession of the property and the rents and profits during administration, or until the property was surrendered to the heirs or devisees, and whose right to possession was not terminated by completion of administration within Section 1304, and who had released her claims or surrendered to the heirs and devisees within Section 1305, was a "party," so that where plaintiff put in decedent's declarations against interest, decedent's self-serving declarations were admissible.

Executors and Administrators—Realty—Right of Possession.

6. While the condition of an estate may be such as not to require an executrix to take possession of the real property, her right to possession continues until foreclosed by a settlement of the estate, or otherwise terminated.

Specific Performance—Sufficiency of Evidence—Oral Contract.

7. Evidence, in an action for specific performance of a contract to sell an interest in land when an irrigation ditch was completed, and to credit plaintiff with any money advanced or any work done on the construction of the ditch, held not to clearly establish the terms of the contract, or that plaintiff's possession and work was referable to any contract for the sale of the land.

Appeal and Error—Question of Fact—Findings—Conclusiveness.

8. While the findings of the circuit judge are not binding on the appeal of a suit in equity, they are not without weight, especially when the evidence in the record is conflicting.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

The plaintiffs, Lane Goff and Laura Goff, are endeavoring to enforce an oral contract, which they claim was made with L. S. Kelsey, for the conveyance of an undivided one-fourth interest in 1,160 acres of land in Union County. L. S. Kelsey died on May 15, 1913, before the commencement of this suit. Laura Goff is the wife of Lane Goff and a daughter of L. S. Kelsey. The persons made defendants are Grace Kelsey, as the widow of L. S. Kelsey, and also as the executrix of his estate, six daughters of the deceased, who are Lettie Wilson, Violet Parker, Edna Moore; Maude Hutchinson, Nellie Hutchinson and Ethel Foresstrom, with their respective husbands, and two grandchildren, Earl Wilson and Eva Wilson.

In substance the complaint alleges that in the winter of 1910 and 1911 L. S. Kelsey orally agreed to construct an irrigation ditch from the North Powder River, a distance of about 17 miles to the 1,160 acres, and that when the ditch was completed he would sell to Lane Goff an undivided one fourth of the land; also to Charles E. Hutchinson, the husband of Maude Hutchinson, to W. H. Hutchinson, the husband of Nellie Hutchinson, and to Luther Moore, the husband of Edna Moore, each an undivided one fourth; and that the agreed price was \$16 per acre, one fourth of which was to be paid down, with the privilege of paying the balance at any time within 10 years, with the further understanding that any money advanced for and any work done on the construction of the ditch by Goff would be credited as payment on the purchase price. The pleading relates that in 1911, 1912 and 1913, rights of way were acquired, the ditch was sur-

vayed and constructed to the land in dispute; that the work done by Lane Goff was reasonably worth \$2,000; and that he constructed lateral ditches on the 1,160 acres. The complaint explains that Luther Moore declined to carry out his part of the agreement, and for that reason L. S. Kelsey agreed to convey an undivided one half to Charles E. Hutchinson. The plaintiffs continue their version of the controversy by averring that Lane Goff partly performed the contract, not only by work on the main ditch, but also by taking possession of an undivided one fourth of the 1,160 acres, and constructing permanent lateral ditches in 1911 and 1912 over every part of the premises that could be covered, breaking and reducing the land to cultivation and repairing a dwelling-house and barn located on the property. The initial pleading relates that L. S. Kelsey, acting for the plaintiff Lane Goff and the defendants Charles E. Hutchinson and W. H. Hutchinson, rented the entire tract of 1,160 acres to other persons for the season of 1913, with the understanding that plaintiff was to receive one fourth of the rental. Grace Kelsey and the daughters Maude Hutchinson, Nellie Hutchinson, Edna Moore and Ethel Foresstrom, with their respective husbands, answered and denied that L. S. Kelsey made any agreement to sell to Lane Goff or that the latter took possession of the premises under any contract to purchase, or that he made any permanent improvements. The answering defendants allege that Goff entered upon a part of the land pursuant to an oral agreement of lease made in 1911, and his tenancy continued until the fall of 1912, when "L. S. Kelsey took back the land, and plaintiff Lane Goff then and there voluntarily gave it up." The decree of the Circuit Court was for the defendants, and the plaintiffs appealed.

AFFIRMED.

For appellants there was a brief with oral arguments by *Messrs. Crawford & Eakin*.

For respondents there was a brief with oral arguments by *Mr. William H. Strayer* and *Mr. Charles H. Finn*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The pivotal points of difference between the contesting parties to this litigation are: (1) Whether L. S. Kelsey agreed to sell to Lane Goff; and (2) whether Goff's occupancy of a part of the land and the work done by him on the premises and on the ditch were sufficient to authorize the enforcement of an oral agreement. If L. S. Kelsey did not agree to sell to Goff, then it will not be necessary to discuss any other question; but, even if an agreement was made, it will not avail plaintiffs, unless the bar raised by the statute of frauds has been removed by the acts of Goff in using and working on the premises.

1. Well-established rules fix the measure of evidence which must be furnished before the plaintiffs can successfully claim that they have proved an oral contract for the sale of land. The terms of the agreement must be shown by full, complete and satisfactory proof, and "the certainty of such a contract must be established by evidence sufficient to satisfy a court of equity of the truth of the allegations of the complaint," but proof beyond a reasonable doubt is not required: *Wagonblast v. Whitney*, 12 Or. 83 (6 Pac. 399); *Sprague v. Jessup*, 48 Or. 211 (83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410); *West v. Washington Ry. Co.*, 49 Or. 436 (90 Pac. 666).

2, 3. Laura Goff is a daughter and Lane Goff is a son-in-law of the deceased, and for that reason proof of possession under the alleged oral contract, although it may be sufficient when the contracting parties are strangers, is not enough of itself to avoid the statute of frauds as between relatives; but, if the plaintiffs show, as they claim here, that Lane Goff took possession of the premises with the intention of carrying out the oral agreement and, because of having entered into the agreement, made valuable permanent improvements, then a court of equity would be warranted in enforcing the contract: *Barrett v. Schleich*, 37 Or. 613 (62 Pac. 792); *Pugh v. Spicknall*, 43 Or. 489 (73 Pac. 1020, 74 Pac. 485); *Zeuske v. Zeuske*, 62 Or. 46 (124 Pac. 203); *Thayer v. Thayer*, 69 Or. 140 (138 Pac. 478); *Stalker v. Stalker*, *ante*, p. 291 (153 Pac. 52).

4. The court received evidence of declarations made by L. S. Kelsey against his interest in respect to the real property, and evidence of that character was clearly competent: Sections 710 and 727, subd. 4, L. O. L.; *Stalker v. Stalker*, *ante*, p. 291.

5, 6. There is a class of self-serving declarations which becomes competent as evidence when brought within the scope of Section 732, subdivision 2, L. O. L., where we read:

“That when a party to an action, suit, or proceeding by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same subject matter in his own favor may also be proven.”

The defendants introduced evidence showing that the deceased also made statements in his own favor concerning his disposition of the land; and the plain-

tiffs contend that this character of evidence is incompetent because Grace Kelsey, as executrix, was not a proper party. Numerous witnesses testify that they had heard Kelsey declare that he had sold an undivided one-fourth interest to Lane Goff; and so, too, witnesses told of having heard Kelsey say that he had rented the land to Goff, and that the deceased had complained because Goff had not paid any rent. Nellie Hutchinson testified that her father told her that Goff had not purchased any land "and that he (Kelsey) was not going to rent it to him (Goff) any more because he had not farmed it right, and he was ruining the ground."

At the trial the plaintiffs did not even suggest the objection they now make. The evidence was admissible, however. Grace Kelsey, in her representative capacity as executrix of the estate, is a party defendant and was made such by the plaintiffs themselves when they filed their initial pleading; and, moreover, there is nothing to indicate that she is not a proper party. The executrix is entitled to the possession of the property and to receive the rents and profits until the administration is completed or the property is surrendered to the heirs or devisees: Section 1185, L. O. L. The complaint alleges that Grace Kelsey as executrix "is now administering said estate under the terms of said last will and testament," and consequently the right of the executrix to take possession has not been terminated by the completion of the administration of the estate: Section 1304, L. O. L. The record does not contain any suggestion that the land has been released from any claim of the executrix or surrendered to the heirs and devisees pursuant to Section 1305, L. O. L. It is true that the condition of the estate may be such as not to require the executrix to take possession of the real property, but the right of possession continues

until it is foreclosed by a settlement of the estate or is otherwise terminated: *Clark v. Bundy*, 29 Or. 190 (44 Pac. 282). It is fair to assume that the plaintiffs believed that the executrix was either a necessary or a proper party, or it may be that they wished to invoke Section 1269, L. O. L., which provides:

“If any deceased person was at the time of his death a party to a bond for a deed or other enforceable contract requiring said deceased to convey real estate, the interest and title of said deceased may be conveyed by his executor or administrator, upon full compliance with the terms and conditions of such bond or contract by the other party thereto, and a deed so made shall transfer the same title as though made by such deceased if living.”

The plaintiffs are the parties who impleaded the executrix; and, furthermore, a situation is presented where the legal representative of the estate has either taken possession of the land in controversy, or, if she had not already done so, the executrix may yet attempt to enter into possession of the real estate, and therefore Grace Kelsey in her representative capacity is a proper party defendant. Since this is a suit against an executrix within the meaning of the statute and the plaintiffs not only appeared as witnesses in their own behalf, but also offered evidence of statements made by L. S. Kelsey against the interest of deceased and his successors, it follows that “statements of the deceased concerning the same subject matter in his own favor may be proven”: Section 732, subd. 2, L. O. L.; *Jones v. Hill*, 62 Or. 53 (124 Pac. 206); *Beard v. Beard*, 66 Or. 526 (133 Pac. 795).

7. Having stated the rules pertinent to the issues involved, we shall briefly consider the recitals appearing in the record. The entire tract of land was arid, and

for that reason was of but little value unless made irrigable. Kelsey commenced the construction of an irrigation ditch some time in 1910, and it was not completely finished until after his death, which occurred on May 15, 1913, although water was obtainable from and after 1911. In December, 1911, Charles E. Hutchinson orally agreed to purchase an undivided one-half interest in the land, and at that time paid his father-in-law \$3,000; and on October 5, 1912, the agreement was reduced to writing. In June, 1912, L. S. Kelsey verbally contracted to sell an undivided one fourth to his daughter, Nellie Hutchinson, who made a part payment of \$250; but at some time in the fall of 1912 they rescinded the agreement. Goff farmed about 93 acres of the premises in 1911 and 1912, and during those two seasons the remainder of the land which was cultivated was cropped by renters. In 1911 Goff harvested 845 bushels of grain, and in 1912 he raised 600 sacks of oats and wheat. A man who was working for Goff lived on the 93 acres mentioned, while the plaintiffs at all times resided on a farm about three miles from the property in dispute. After the crops were removed in 1912 Goff quit the premises and then all the land was rented by Kelsey and Charles E. Hutchinson to Jensen and Newman, who cropped about 500 acres in the season of 1913.

The plaintiffs claim that Kelsey orally agreed to sell to Lane Goff an undivided one fourth of the 1,160 acres, to be divided when the "ditch was dug," for \$16 per acre, payable at any time within 10 years, with the further understanding that any work done by Goff on the ditch would be credited on the purchase price of the land. Lane Goff contends that he took possession of the 93 acres and farmed that much land in 1911 and 1912, with the intention of carrying out the oral

agreement relied upon; and while he admits that he relinquished possession after the crop season of 1912, he nevertheless claims that the premises were leased to others for the year 1913, pursuant to an understanding with Kelsey that the latter might rent the property for the use and benefit of Goff, and that therefore the tenancy of Jensen and Newman redounded to the benefit of the plaintiffs. The Goffs also insist that the construction of the laterals on the land, work on the main ditch, and repairs to the house and barn furnished the necessary element of permanent improvements. The answering defendants deny that Kelsey ever agreed to sell to Goff, and assert that, even though there was an oral agreement to sell, the plaintiffs are remediless, because Goff occupied the land as a tenant, and not as a contracting purchaser. The evidence establishes the fact that Kelsey did make an agreement to sell to Goff, and that the terms were in the main as contended by the plaintiffs, although it is doubtful whether all the details, such as the payment of taxes, had been settled. Goff never paid any of the taxes because as he says, "I did not have the title," although the written contract with Charles E. Hutchinson specifically provides that the purchaser shall "pay and keep paid all of the taxes on the lands hereby sold during the continuance of this contract of sale."

The repairs to the house and barn were comparatively trifling, and only such as were necessary to make the buildings habitable. It is true that Goff performed work on the main ditch, and that he claims that this work was done because of his contract to buy, while the adverse parties contend that Goff was working for Kelsey the same as other employees.

The recitals are so widely divergent and the evidence so largely consists of positive affirmations in

behalf of one set of litigants, followed by equally emphatic denials for the opposing parties, that any attempt to reconcile the conflicting testimony would be like trying to transform a rainbow into an arc of a single hue. No useful purpose would be served by an extended recitation and discussion of the testimony, but we do note, in passing, that Kelsey leased all the land to other parties after the crops were harvested in 1912, and Goff was not consulted concerning any of the features of the agreement with the tenants Jensen and Newman; that after Goff quit the premises in 1912, he did not assert any claim to an interest in either the land or the crops until after the death of L. S. Kelsey; that when Charles E. Hutchinson had a settlement with Kelsey after the harvest of 1912, the latter accounted to the former on the basis of having received as rental one third of the crop raised by Goff; that Mrs. Violet Parker, who is prosecuting a suit against these same answering defendants and presumably is not in harmony with them, as a witness for plaintiffs, on cross-examination and without objection being made by the plaintiffs, testified that in "the spring that he was killed" she heard her father speak "of renting Mr. Goff's part in order to give the renter a better advantage and get a better renter"; that, when explaining his failure to return seed wheat furnished by Kelsey in 1911 and sown by the plaintiff on the 93 acres, Lane-Goff stated:

"The next fall after harvest I went to Mr. Kelsey and asked him if he wanted me to return that wheat or pay him for it. He says, 'Never mind about the wheat. We have failed on the crop; we haven't made anything, and I don't want you to pay anything until we make something.' "

The plaintiffs have failed to establish that their possession, or any work done by them, was referable to any contract for the sale of land, even if it be assumed that they have proved all the terms of such contract: *Wagonblast v. Whitney*, 12 Or. 83 (6 Pac. 399). We also call attention to the fact that the trial court found "from the testimony that at one time there was some sort of oral agreement between plaintiff Lane Goff and said L. S. Kelsey, during his lifetime, for the purchase of an interest in said lands, but in which the wife of said L. S. Kelsey did not join, but that said plaintiff Lane Goff did not enter into possession of said land or interest therein under said agreement, if any, that he was upon said lands in 1911, but only as a tenant, and whatever contract there was he abandoned and was rescinded by the parties; that plaintiff permitted L. S. Kelsey and Charles E. Hutchinson to rent the lands to another in 1913, and did not assert any right to any part of said land until after the death of said L. S. Kelsey."

8. The trial court had the benefit of a kind of evidence which a mere paper recital cannot possibly preserve; he saw the witnesses, heard them testify, and observed them while they were testifying. While the findings made by the circuit judge are not binding on the appeal of a suit in equity, still they are by no means without weight, especially when a record is presented like the one here: *Jones v. Hill*, 62 Or. 53 (124 Pac. 206).

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE EAKIN did not sit.

Argued October 29, affirmed December 7, 1915.

HEGDALE v. WADE.

(153 Pac. 107.)

Vendor and Purchaser—Dealing at Arm's-length.

1. Where the buyer of farm lands represented to the sellers that he was an experienced farmer, owned a valuable farm in another state, and knew good land when he saw it, the parties dealt at arm's-length, and the contract could not be rescinded for misstatements of the sellers as to the quality of the soil.

[As to buyer's risk, see note in 75 Am. St. Rep. 77.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Andrew J. Hegdale against Albert E. Wade and Augustus G. Kingman, to rescind a contract for the purchase of land, to set aside a note and mortgage, and to recover sums of money paid on account of the purchase of the realty and expended in its improvement. The complaint charges, in effect, that the defendants fraudulently represented to the plaintiff that all of lots 2, 3, 4 and 5 in section 31, township 20 south, range 47 east of Willamette Meridian, in Malheur County, Oregon, was good agricultural land, free from alkali, and, with irrigation, would produce good crops and such as were raised in that vicinity; that the realty so described contained alkali, would not produce crops by irrigation, and was valueless for agricultural purposes, as was well known by the defendants, who made such representations to deceive the plaintiff and to induce him to purchase the land at a price greatly in excess of the real value; that for many years prior to such purchase, the plaintiff had been engaged in fishing, and had no knowledge of farming or of the value of lands for agricultural purposes, which facts were well known to the defendants

when they made such representations and then told him they were responsible for their statements, upon which he could rely, all of which fraudulent narrations were made to induce him not to inquire of others as to the value of such land or as to its capability to produce crops by irrigation; and that, relying upon such representations, the plaintiff was deceived to his damage, specifically setting forth the extent of his alleged losses.

The answer denies most of the averments of the complaint, and for a further defense alleges, in substance, that prior to such purchase the plaintiff represented to the defendants that he was an experienced farmer, owned a valuable farm in the State of Washington, and knew good land when he saw it; that before buying the realty described the plaintiff made full investigation thereof, and inquired of farmers in that vicinity their opinions in respect to the premises; that the only representations ever made to the plaintiff were that the land had never been planted to crops, and its fertility and productivity were unknown; that such realty is good agricultural land, adapted to the growing of crops usually raised in that vicinity; that the plaintiff was negligent in seeding and irrigating the premises; that he did not sow sufficient thereof to demonstrate its worth for agricultural purposes; and that no part of the land so planted by him was irrigated.

The reply put in issue the allegation of new matter in the answer, and, the cause being tried, the suit was dismissed and plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. A. E. Cross* and *Mr. C. C. Wilson*, with an oral argument by *Mr. Cross*.

For respondents there was a brief over the names of *Mr. P. J. Phillips* and *Mr. Robert M. Duncan*, with an oral argument by *Mr. Phillips*.

Opinion by MR. CHIEF JUSTICE MOORE.

The transcript of testimony shows that prior to July 1, 1913, the plaintiff, Andrew J. Hegdale, had for several years been engaged in fishing in the Columbia River and at Grays Harbor, Washington, in which state he had made a homestead entry on public land that was covered with timber, which premises he had partially cleared and improved. Intending to purchase other real property, he went to Ontario, Oregon, about the time stated and, crossing the Snake River, he examined lands in Idaho known as the Payette Valley and the Roswell Bench, which sections are noted for their fertility. Returning to Malheur County, Oregon, he inspected an 80-acre tract, and paid Ed. Blodgett, a land agent, \$10 for an option to purchase the real property. The following day he crossed another piece of land in that country bordering on such river, which premises the defendant Albert E. Wade was leveling to prepare for irrigation and cultivation. Hegdale and Wade, taking a skiff, rowed up that stream, thus having an opportunity to determine the depth of soil along the bank of the land hereinbefore described. The plaintiff, being pleased with the location of the premises, refused to accept a conveyance of the land on account of which he had made the payment. Thereafter he agreed with Wade to purchase the lands so bordering on the river, containing 63.4 acres, according to government survey, stipulating to pay for the realty and for 64 shares of stock in the Kingman Colony Irrigation Company \$3,700, accepting a deed of the premises subject to a mortgage

of \$1,600, and interest, given to secure the purchase of the irrigation stock, which encumbrance the plaintiff was to assume and discharge. He was to pay Wade \$1,200 when the deed was delivered, and also to execute to him a promissory note for \$900, and secure the payment of that sum by a mortgage of the premises to evidence the remainder of the purchase price. The defendant Augustus G. Kingman being a tenant in common with Wade, they and their wives on July 9, 1913, executed a general warranty deed of the lots so described to Hegdale, who thereupon paid the \$1,200, and also executed the note and mortgage for \$900. An abstract of the title to the realty revealed a judgment that had been rendered against Wade for more than \$900 which was then a lien upon the land, whereupon the note and mortgage that had been delivered were returned to Hegdale, to be retained by him until the judgment lien was discharged. Immediately after securing a transfer of the title, the plaintiff took possession of the premises and continued leveling the land for irrigation and making other improvements upon the premises. Without securing a satisfaction of the judgment Wade commenced an action against Hegdale to recover possession of the \$900 note and mortgage but such action was dismissed. Thereafter the judgment lien was discharged and Wade commenced a suit to foreclose such mortgage, whereupon this suit was instituted.

The evidence shows that, with the exception of a strip averaging about 200 feet in width along the bank of the Snake River, the land in question is practically valueless for agricultural purposes. A ridge along that stream renders the back part of the land lower than the front. Before the premises were cleared the ridge bore sagebrush, while the back part of the land

produced greasewood. The soil upon which the latter shrubs grew is in the nature of blue clay, and, when irrigated, the water, instead of penetrating the ground, remains in puddles in the low places, where, evaporating, the surface remains very hard. The back part of the land contains alkali, which, being liberated by irrigation, remains a white substance when the water disappears. Several experts who were well acquainted with such conditions of soil expressed opinion that the greater part of the land of plaintiff could be rendered fit for agriculture by thorough draining and leveling and by mixing sand with the clay, thus entailing a great outlay of money and labor. An experienced irrigator was employed who turned water from ditches upon the plaintiff's land, causing the seed that was sowed thereon to germinate, but, the surface of the ground becoming hard after the water disappeared in vapor, the crops entirely failed.

The testimony tends to show that the plaintiff's horses strayed, and he spent much time in looking for them when his land needed attention, and that by reason of his absence stock came upon his premises and injured the growing crops. A careful examination of the entire testimony leads to the conclusion that the greater part of the land in its present condition is practically worthless for agricultural purposes, and that the cost of making such part of the realty productive is prohibitive. The plaintiff, though owning in Western Washington a homestead covered with timber, does not appear to have had any knowledge of the arid country of Eastern Oregon until going to that section about July 1, 1913, and eight days thereafter securing a deed to the land mentioned.

Hegdale testified that Wade took him to the bank of the river and called particular attention to the depth

of soil at that place, saying that the quality of the entire tract was just as good as the lands on the Roswell Bench or in the Payette Valley, in Idaho, which sections the witness had visited, that the premises particularly described would grow everything that could be raised in that vicinity, and recommended the kind of fruit trees which should be set out. The plaintiff offered testimony tending to substantiate each material averment of the complaint. The defendant Wade, with whom the contract to purchase the land was made, specifically denied each alleged representation so imputed to him by the plaintiff respecting the quality of the realty or its value for agricultural purposes, saying, in effect, that the plaintiff carefully viewed the entire premises, judged for himself, without any statements by the witness upon the subject, the adaptability of the land for the successful raising of crops, and that Hegdale also stated to the witness that he knew the character and value of all land in that section of the country when he saw the premises, and, referring to the 80 acres on account of which he had deposited \$10 as part consideration for the purchase thereof, said it was gravelly and produced salt grass. Wade further testified in support of each averment of new matter in the answer. The fact that Hegdale abandoned that tract of land after negotiating for its purchase tends to prove that he thought, at least, he knew something about the quality of the soil in that vicinity, and to confirm Wade's sworn statements in these particulars. It is impossible by any means to reconcile the contradictory testimony given by these witnesses. A careful examination of their sworn statements, when read in connection with the testimony of all other witnesses, leads us to believe that the trial court reached a proper conclusion upon the merits of the case, and

that the rule announced in *Black v. Irvin*, 76 Or. 561 (149 Pac. 540), where the plaintiff said, in referring to the subject matter of the suit, "I am familiar with the restaurant business, and there is nobody can hand me anything on a restaurant or hotel deal * * because I have had a lifetime at the business," is controlling herein.

It follows that the decree should be affirmed; and it is so ordered. AFFIRMED.

Argued October 27, reversed December 7, 1915.

SPAIN v. OREGON-WASHINGTON R. & N. CO.

(153 Pac. 470.)

Appeal and Error—Review—Finding on Conflicting Evidence.

1. A jury's finding on substantial conflicting evidence cannot be questioned on appeal.

False Imprisonment—Persons Liable—Carriers—Arrest of Passenger by Conductor—Liability of Road—Statute.

2. Under Laws of 1911, Chapter 135, providing that to be intoxicated or to drink intoxicating liquor in an ordinary passenger car is a punishable crime, and Section 6959, L. O. L., declaring that the conductor of a railroad train, while actually engaged as such, shall have the power of a sheriff, in each county through which the train passes, to protect the public peace and arrest violators thereof on or near the train, where defendant railroad's conductor arrested a sober passenger on the pretext that he was drunk, the railroad could not escape liability for the tort on the ground that the conductor was acting as sheriff and had laid aside his character as defendant's servant.

[As to what amounts to false imprisonment, see note in 118 Am. St. Rep. 719.]

False Imprisonment—Evidence—Good Faith.

3. In an action against defendant railroad by one claiming to have been arrested by the conductor, ejected from the train, and thrown into prison for drunkenness, when in fact perfectly sober, testimony that plaintiff's companions, who drank with him from the same bottle, were not disturbed by the conductor, was admissible as bearing on the good faith of the conductor in making the arrest.

Evidence—Res Gestae.

4. Such testimony was admissible as part of the *res gestae*.

False Imprisonment—Evidence—Continuing Character of Tort.

5. Where defendant railroad's conductor arrested plaintiff on the pretext that he was drunk, ejected him from the car, and turned him over to the railroad's watchman, who incarcerated him in a city jail, the road's trespass was one continuing through the incarceration and up to plaintiff's release, and it was liable for the imprisonment, as well as the unlawful ejection, so that evidence was admissible to prove the condition of the city jail.

False Imprisonment—Damages—Mental Suffering.

6. Where a railroad passenger was taken from the train by the conductor and other agents of the road on the pretext that he was drunk and drinking in the car, which arrest was accomplished with some degree of physical force and involved a false imprisonment of the passenger, in his action against the road he could recover for humiliation on account of the public ejection from the car, although, except in cases of slander, breach of promise, and the like, a recovery for mental suffering unaccompanied by physical injury will not be permitted.

False Imprisonment—Evidence—Relevancy.

7. In an action against a railroad for injuries sustained by plaintiff when arrested for drunkenness, by defendant's conductor, ejected from the train, and imprisoned, testimony of a witness, who had given plaintiff the bottle from which he was drinking at the time of the arrest, which plaintiff claimed contained ginger ale instead of beer, that he (the witness) was a good, clean athlete and drank no liquor, was admissible.

Judgment—Conclusiveness—Conviction of Crime.

8. Where defendant railroad ejected plaintiff passenger from its train, arresting and imprisoning him in the city jail for being drunk and drinking on its car, plaintiff's plea of guilty to a charge of being drunk and disorderly in the city had no conclusive effect in his subsequent civil action for his arrest and ejection by the road.

Evidence—Admission—Record of Previous Conviction on Plea of Guilty.

9. Where plaintiff passenger, after his arrest by defendant railroad's conductor and ejection from the train for being drunk, pleaded guilty to a charge of being drunk and disorderly in the city, the record of the conviction, in plaintiff's subsequent suit against the road for his arrest by the conductor, was admissible in evidence as an inconclusive admission against plaintiff's contention in the suit that he was sober when arrested.

Trial—Taking Case from Jury—Speculative Verdict.

10. In an action by a railroad passenger for his arrest and ejection from defendant's train as intoxicated, and his subsequent imprisonment, which he claimed caused him to undergo a second amputation of his arm, where plaintiff's evidence as to the cause of such second amputation left it a matter of speculation whether the cause thereof was a cold caught in the jail in the unhealed original amputation, or infection from unsterilized bandages, etc., the court should have withdrawn from the jury the subject of the second amputation, as an element in plaintiff's recovery, since, when the evidence leaves the case in such situation that the jury must guess as to which of

several possible causes occasioned the injury, such part of the case should be withdrawn from their consideration.

Trial—Verdict—"Quotient Verdict."

11. A "quotient verdict," reached by the jurors adding their several amounts of recovery and dividing the sum by their number, is illegal.

Trial—Verdict—Impeachment by Juror.

12. Affidavits of jurors will not be received to impeach a quotient verdict, whether made by members of a unanimous jury or by non-concurring jurors under the statute allowing three fourths of the jurors to return a verdict.

[Misconduct of jurors, other than their separation, for which verdict may be set aside, see note in 134 Am. St. Rep. 1033.]

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is an action by John Spain against the Oregon-Washington Railroad & Navigation Company, a corporation, for damages for the unlawful ejection of plaintiff from defendant's train and for causing him to be wrongfully and causelessly imprisoned. The complaint charges, in substance, that on October 19, 1912, plaintiff was a passenger on defendant's train, and that at the time of the alleged assault he was riding thereon through the City of Huntington; that just prior to the departure of the train from Huntington, in the presence of a large number of persons, the defendant's conductor and other agents wrongfully assaulted and dragged him from the car where he was sitting, ejecting him therefrom with great violence, erroneously accused him of drinking intoxicating liquor and being drunk, to his great shame and humiliation, and without cause occasioned his arrest and incarceration for several hours in a jail which was filthy and infested with vermin and unfit for human habitation; that there was no heat in the jail, and the weather being cold and inclement he suffered intense pain; that his arm had recently been amputated, and that he

was then on his way to consult his regular physician; that the detention in jail and exposure therein caused his arm to become greatly inflamed and seriously worse than when the arrest was made, which together with the loss of medical attention for a period of 24 hours necessitated a second amputation; that by reason of the premises he was compelled to have his business attended to by other persons at great cost, to employ medical attendance, and to undergo an operation which occasioned great pain, worry, loss of sleep, etc., whereby he was injured and further damaged in the sum of \$4,000; that at the time of his arrest and prior thereto plaintiff did not drink and had not drunk intoxicating liquors, nor was he at said time in a drunken or intoxicated condition.

To this the defendant answered by a general denial of all the allegations of the complaint relating to the arrest and imprisonment, except as set up in its further and separate answer, wherein it was alleged that at the time of plaintiff's arrest he was upon defendant's car in a state of intoxication, and did then and there, in the presence of the passengers and of a peace officer of the State of Oregon, drink intoxicating liquors upon said car, which was not a dining buffet or private car, but a regular passenger-car, and that said peace officer thereupon arrested plaintiff and placed him in the city jail, restraining him there; that thereafter on the twentieth day of October, 1912, plaintiff was complained of by the city authorities for violation of Ordinance No. 22 by being drunk and disorderly within the city limits, and plaintiff voluntarily entered a plea of guilty to said charge, and thereupon a judgment of conviction was entered against him; that the matters out of which the charge arose and the plea of guilty entered therein by plaintiff are the same inci-

dent complained of in plaintiff's complaint, and that plaintiff is therefore estopped from claiming or asserting the matters therein set forth.

To the new matter stated in the answer plaintiff replied by denials, and a trial was had resulting in a verdict and judgment for plaintiff, which verdict was concurred in and signed by only nine jurors. Upon a motion for a new trial defendant, among other matters urged at the hearing of the motion, produced the affidavits of the three jurors who refused to concur in the verdict rendered, wherein they deposed that the result arrived at was a quotient verdict, determined by each of the nine jurors writing down the amount he believed the plaintiff was entitled to recover and dividing the aggregate of the sums suggested by nine, which quotient it had been previously agreed should stand as the verdict. The motion for new trial having been overruled, the plaintiff had judgment and defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Mr. Arthur C. Spencer*, *Mr. James H. Nichols* and *Mr. Charles E. Cochran*, with an oral argument by *Mr. Spencer*.

For respondent there was a brief over the names of *Mr. William H. Strayer* and *Mr. Charles F. Hyde*, with an oral argument by *Mr. Strayer*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. The question as to whether plaintiff was intoxicated or drinking intoxicating liquor is foreclosed by the verdict of the jury so far as this court is concerned. If plaintiff and his witness are to be believed, he was

utterly innocent of drinking any intoxicating liquor and was duly sober; while, on the other hand, several apparently reputable witnesses testified that he was not only drinking liquor, but was exceedingly drunk. The jury evidently accepted the testimony of plaintiff and his witness, and we must therefore assume that plaintiff was peacefully and soberly traveling on defendant's train, and that defendant's conductor seeing him drink ginger ale from a bottle assumed at once it was beer, and calling a deputy sheriff, who was also a watchman employed by defendant, to his assistance, had plaintiff ejected from the train and put under arrest. If plaintiff was drunk or drinking intoxicating liquor on the train, or if his conduct was such as to have induced a reasonable man to believe him drunk, it was not only his right but the duty of the conductor to place him under arrest. To be intoxicated or to drink intoxicating liquor in an ordinary passenger-car is a crime made punishable by Chapter 135, Laws of 1911, while Section 6959, L. O. L., declares that the conductor of a railroad train, while actually engaged as such, shall have the power of a sheriff in each county through which the train passes for the purpose of protecting the public peace and arresting violators thereof on or near such train. Accepting plaintiff's testimony as true, as we must after verdict, it appears that the conductor, without stopping to investigate or ascertain the contents of the bottle, called an officer and caused a perfectly sober passenger to be put under arrest, as a consequence of which he was incarcerated in a cold and filthy prison, detained from his business, and suffered slings and arrows of outrageous fortune as detailed in the Iliad of his woes given in the preliminary statement. Whether the conductor acted in good faith was a question for the jury,

and it was fairly submitted by the instruction given by the court.

3-6. It is contended that the court erred in admitting testimony to the effect that plaintiff's companions, who drank with him from the same bottle, were not disturbed by the conductor; but we think this is admissible, both as a part of the *res gestae* and as showing the good faith of the conductor in making the arrest. The bearing of this testimony upon any phase of the case would necessarily be slight in any event if it had any at all, but, while remote, we do not think it incompetent. The testimony in regard to the condition of the Huntington jail was not improper. If defendant by its agents, the conductor and watchman, unlawfully or maliciously caused plaintiff's arrest and incarceration, it was a continuing tort for the consequences of which the original wrongdoer should be held responsible. The defendant's trespass, if it was one, did not end when the plaintiff was handed over to its watchman, but continued during his incarceration and up to his release. The complaint was drawn upon this theory, and the conditions in the jail are fully set forth as an element of plaintiff's damage. While it is true that the conductor is given by the statute the powers of a sheriff, it is not conceived that when executing the duty of preserving order on the train he ceases to be a servant of his company, or that the statute invests him with any other or different power than that already possessed by him as conductor beyond that of calling upon the bystanders for assistance in making an arrest, which but for the statute he would have no legal right to require. It is impossible to separate the peace officer from the conductor when the duties of both are vested in the same person, and practically the same duty is required in each capacity. "I swear

as a private person and not as a bishop," said a cleric when reproved by the king for profanity. "But," said the king, "if the private person goes to hell for swearing, what becomes of the bishop?" So, if the conductor negligently or willfully assaults a passenger or expels him from the train, what becomes of the peace officer wearing the same skin? The powers given by statute to the conductor are not for the purpose of enabling his employer to escape liability for his acts, but to enable him better to protect its property and passengers from the unlawful acts of others. The same may be said of Rooney, the man actually making the arrest. If, as he says, he saw plaintiff drinking beer on the train and found him on the train drunk, he was justified in arresting him and taking him to jail; but, while he had incidentally a deputy sheriff's appointment, he was nevertheless an employee of defendant and in its service for the purpose of protecting its trains and depots from lawlessness. The deputyship and badge were, no doubt, given him for the purpose of enabling him the more efficiently to perform the duties of his employment. When Rooney, the deputy sheriff, led plaintiff from the train to the street and thence to the jail, Rooney, the watchman of defendant, also led him there, and it was Rooney the agent of defendant, who consented that plaintiff might be charged with a municipal offense instead of a violation of the state law. So that if these employees of defendant acted negligently or willfully in the premises and ejected and imprisoned a sober man who had not violated any law of the state, which fact they might have ascertained by reasonable diligence, the tort was a continuing one including all the discomforts of the jail in which he was confined; and the mere fact that the conductor and watchman were

also peace officers will not relieve the defendant of liability for their tortious acts. Another objection was to the ruling of the court permitting plaintiff to testify as to his sense of humiliation and mortification on account of being publicly ejected from the car. It is well settled that except in cases of slander, breach of promise and the like, a recovery for mental suffering unaccompanied by physical injury will not be permitted: *Adams v. Brosius*, 69 Or. 513 (139 Pac. 729, 51 L. R. A. (N. S.) 36). But the same authorities cited in the case last referred to hold, also, that where the tort is accompanied by physical injury mental suffering may be taken into account. In the case at bar the ejection was accompanied with some degree of physical force, and, if this was not justified, it constituted an assault and involved a false imprisonment of the plaintiff. Under these circumstances the testimony was relevant: 19 Cyc. 368.

7. Another alleged error was the ruling of the court permitting one Workman to answer the following question: "What are your habits as to the use of intoxicating liquor?" The witness replied: "I claim to be a good, clean athlete, and I don't drink any liquor." Ordinarily the question would have been irrelevant, though it can hardly be seen how the answer could have affected the case one way or the other; but in this particular instance the witness had testified that he was the person who furnished a bottle of ginger ale from which plaintiff drank and which the conductor claimed to have been beer. Upon cross-examination he was asked where he got the ale, what sized bottle it was in, and how many bottles he had brought with him; the counsel asking him this question, among others: "Was that really ginger ale, or was it a sort of dry-county ginger ale?" The tendency of the cross-

examination was to suggest a doubt as to the truth of the witness' statement that the contents of the bottle he was carrying and from which plaintiff drank were really nonintoxicating. Under the circumstances there was no impropriety in allowing the witness to state that he did not drink liquors as tending to show the improbability of the assumption that he was carrying intoxicating liquor in his grip or drinking it upon the occasion in question.

8, 9. The next objection is that the court's statement of the issues to the jury did not cover all the material issues. Either in the preliminary statement or during the charge the court covered all the material issues made in the pleadings. That presented by defendant in the way of a request for instructions was too lengthy to be of value to the jury, being practically a summary of the pleadings, which the jury had with them and could read for themselves. The fact that the plaintiff pleaded guilty to a charge of being drunk and disorderly in the City of Huntington was not a material averment in the answer, and the denial thereof in the reply raised no material issue; and the record not being of a matter between the same parties is not conclusive either as evidence or as an estoppel. Its sole value is as evidence of an admission contrary to the plaintiff's present contention. This is supported by the following authorities: *Freeman*, Judgments (4 ed.), § 319; *Black*, Judgments (3 ed.), § 529; *Young v. Copple*, 52 Ill. App. 547; *Clark v. Irvin*, 9 Ohio, 131; *Jones v. Cooper*, 97 Iowa, 735 (65 N. W. 1000); *Corbley v. Wilson*, 71 Ill. 209 (22 Am. Rep. 98). In *Freeman*, Judgments (4 ed.), § 319, the rule and reason for it are thus stated:

“So a judgment of conviction founded upon a plea of guilty may be received in a civil action as an admis-

sion by the defendant of the facts confessed by his plea; but this is manifestly only a mode of proving such admission, and cannot be regarded as estopping the defendant from showing that notwithstanding such confession and conviction he was not guilty."

To the same effect it is said in Black, Judgments (3 ed.), § 529:

"In the next place, a criminal sentence may be admissible in evidence as a species of admission, although, strictly, it is not proper to be received as *res judicata*. Thus, in a civil action for assault and battery, the defendant gave in evidence, in mitigation of damages, the record of his conviction in a criminal court on an indictment for the same assault and a receipt of the sheriff for the fine and costs of the prosecution. The judge charged that, the record of such conviction having been given in evidence by the defendant himself, it was no longer a matter of doubt that an assault had been committed, and the plaintiff would be entitled to some damages. And herein, it was held, there was no error. On the same principle, if the defendant in a criminal prosecution pleads 'guilty,' the record of such prosecution and plea may be used as evidence against him in a subsequent civil action involving the same subject matter as tending to prove the act or fact on which the indictment was framed. But since it is not the criminal judgment, but the plea, or rather the fact of his having so pleaded, that thus becomes evidence, it is not conclusive upon him. It is receivable as an admission or confession, but it may be controverted, and must be weighed by the jury."

Respectable authority is found supporting a contrary doctrine, but it is believed that the better rule is that herein enunciated. Most of the authorities will be found cited in *Erie R. Co. v. Reigherd*, 166 Fed. 247 (92 C. C. A. 590), as reported in 20 L. R. A. (N. S.) 295 (16 Ann. Cas. 459).

10. Other objections as to rulings and instructions of the court are raised, but we consider all of them without substantial merit, save the exception to the instruction of the court submitting to the jury the question as to reinfection of the wound arising from exposure in the jail and the damages caused by reamputation and loss of business. Plaintiff's original injury, as shown by the testimony, occurred early in July, 1912, and was occasioned by his hand becoming entangled in a rope (presumably attached to a horse), whereby his wrist was cut to the bone and all the arteries severed, necessitating the amputation of his right hand at the wrist. The wound never completely healed and continued to discharge pus and pieces of necrosed bone up to the time he started to Boise, about the 17th of October, 1912. Plaintiff stayed at Boise one day and started back the next evening, and was arrested at Huntington about 11 o'clock P. M. of the 19th of October. He states that he had some horses out on the track at Boise which he had leased out, and did quite a lot of running around, and was pretty tired when he got on the train; that there was a spot on his arm which was unhealed and discharging pus, but there was no inflammation, and the arm felt all right until he got to Huntington; that he took cold in the wound in the jail, and it began to swell and got worse; and that finally it had to be reamputated. Workman, the next witness called, stated that when plaintiff got on the train at Boise he was perfectly sober, but said he was tired out, and took a nap once in a while. Mrs. Simms, of Union, testified that she dressed plaintiff's arm when he was starting to Boise, and had dressed it several times before; that it was healing nicely; that there was an unhealed spot about as large as a ten-cent piece from which a little pus exuded at times, but

no swelling or inflammation; that when plaintiff returned his arm was a great deal worse and was running "quite a little bit," and continued to grow worse until the second amputation; that it never at any time after the first amputation ceased entirely from discharging pus. Dr. Myers, of Union (who is to be distinguished from Dr. Myer, of Baker, who performed the first amputation), was called as a witness for plaintiff, and testified that he saw the plaintiff's arm on July 7th, before the first amputation, but was not present when it was amputated; that he dressed the wound frequently in August and possibly for the last time early in September, though he hardly thought he did so at so late a date as that; that several small pieces of necrosed bone came from the wound, and it was still discharging some pus the last time he dressed it, which indicated some kind of infection; that at that time he advised plaintiff not to have the arm reamputated for a while, believing that when all the dead bone came out it would heal of itself. He was then asked these questions on direct examination:

"Now, doctor, assuming that on the 16th or 17th of October, 1912, Mr. Spain's arm had healed over with the exception of a spot about the size of a dime which was scabbed over and occasionally some pus would come from that, but there was no indication of swelling or inflammation; and further assuming that on the twentieth day of October, or about three days later, this scab on the end of his arm was inflamed, swollen, and sore—what would that, in your opinion as a physician and surgeon, indicate?

"A. It would indicate it was reinfected from some source or another; that might indicate a lack of drainage, the drainage might have got stopped.

"Q. One or the other, or both?

"A. Yes, sir.

"Q. You say it might indicate it had been reinfected?

"Yes, sir.

"Q. In what way would it be possible to reinfect it?

"A. It might be externally from getting in contact with the dirt, or it might get reinfected through manipulation of any kind that would cause a scattering of the infection already present.

"Q. Assuming he had been handled with more or less violence to the extent of loosening and removing the bandage so either it might have become reinfected or added infection arise from that cause?

"A. That would depend upon whether the wound was actually hurt or not at the time from an internal standpoint, and, if the bandage was removed from an external standpoint, it would probably be reinfected externally.

"Q. Explain to the jury how this would get infected by a removal of this bandage.

"A. That could be done simply by getting external dirt into the wound. Dirt is infectious that has not been sterilized.

"Q. What do you mean by a scattering of the infection?

"A. If you have a pocket of pus, for instance, there is a granulated tissue will grow that will envelope the pus; if you get that injured so it breaks up that granulated tissue, then the infection will travel into new uninjured tissue.

"Q. What would bring that about?

"A. By rough usage of any kind.

"Q. Would it require very rough usage to do it?

"A. That depends on the stage of the granulation."

In answer to questions propounded on cross-examination, witness stated that, if the wound was unhealed and discharging pus on the 17th of October, the same condition would probably continue until the 20th; that if the dressing applied was not surgically clean, that is, was not sterilized, the dressing itself might cause

infection; that a virulent infection might manifest itself in 24 hours, while a more simple type might run 4 or 5 days and then manifest itself very suddenly. Now, from this testimony, which is wholly from plaintiff's witnesses, there may be drawn several inferences: (1) That the inflammation which ensued upon the 21st was a mere phase of an infection already shown to exist in the wound; (2) that it arose from plaintiff's activities around the race-track at Boise; (3) that it came from unsterilized dressings applied by Mrs. Simms before plaintiff's departure to Boise; or (4) that it arose from unsanitary condition existing in the jail at Huntington. There is no evidence which has a tendency to show from which of these causes the subsequent aggravated condition arose. It might have been from any one of them, or, if there exists any reason to differentiate, the first of the possible causes would seem the most probable, as there can be no question under plaintiff's own testimony but that some infection resulting in a discharge of pus existed at the time he left for Boise. That his arm was not in an entirely satisfactory condition while at and returning from Boise is shown by his complaint, which alleges that he was "suffering from a recently amputated arm and was then on his way to consult his regular physician." When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration: *Armstrong v. Town of Cosmopolis*, 32 Wash. 110 (72 Pac. 1038). So far as the wrongful arrest, detention and imprisonment, and the filthy condition of the jail, are concerned, the plaintiff made a case sufficient to go to the jury; but the court should have withdrawn from their consideration

the subject of the effects of these acts upon the condition of plaintiff's arm as constituting an element in plaintiff's recovery.

11, 12. There is one other objection urged to which, as it involves a question of general interest, we will advert. This is the attempt by defendant to show by the affidavit of three dissenting jurors that the verdict was arrived at by taking the aggregate of each juror's estimate of damages and dividing it by nine; the quotient thus obtained having been previously agreed upon as the amount that should stand as a verdict. It has been so often held a quotient verdict is illegal that a citation of authorities on that point is unnecessary. Neither is it necessary to cite authorities to the effect that the affidavits of jurors will not be received to impeach such a verdict. The distinction attempted to be made by counsel between affidavits made by jurors where a unanimous verdict is required, and cases where the affidavits are made by nonconcurring jurors under statutes such as ours, where three fourths of the jurors may return a verdict, finds no support in the authorities. The rule is the same in either case: *Marvin v. Yates*, 26 Wash. 50 (66 Pac. 131); *Saltzman v. Sunset Telephone & Telegraph Co.*, 125 Cal. 501 (58 Pac. 169).

For the error heretofore noted, the judgment is reversed and a new trial directed.

REVERSED AND REMANDED.

Argued September 24, reversed October 13, rehearing denied December 14, 1915.

RUGENSTEIN v. OTTENHEIMER.

(152 Pac. 215.)

Appeal and Error—Change of Venue—Bias of Judge.

1. Where before the trial of a cause the judge makes statements amounting to a prejudgment of the case in favor of the plaintiff, the defendant is entitled to a change of venue, and for the error in refusing to grant the change, the judgment will be reversed on appeal, though the record fails to disclose any prejudice in the trial.

Venue—Motion for Change of Venue—Absence of Counter-affidavits—Effect.

2. In the absence of counter-affidavits, the contents of the affidavits filed in support of a motion for a change of venue must be taken by the court on appeal as admitted.

Damages—Instruction—Assessment of Damages.

3. In an action for damages for personal injuries, it is error to instruct that the jury may award such damages as they think plaintiff is entitled to recover; the correct rule of recovery being such an amount, if anything, as is established by a preponderance of the evidence.

Appeal and Error—Former Decision as Law of the Case.

4. The law as enunciated by the court on appeal as applicable to a given case remains the law of that case for all future proceedings.

[As to what is final judgment where judgment of trial court is reversed on appeal, but is subsequently affirmed, see note in *Ann. Cas.* 1913C, 250.]

From Multnomah: HENRY E. MCGINN, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is an action by Albertine H. Rugenstein against Henry J. Ottenheimer, for personal injuries arising from the fact of plaintiff having been struck by defendant's automobile while walking across Washington Street, in the City of Portland. The case has been tried three times. Upon the first trial the jury was discharged for failure to agree. The second trial resulted in a verdict for plaintiff, from which an appeal to this court was taken, wherein the judgment of the

trial court was reversed and the cause remanded for a new trial. The cause was again tried, and from a judgment for plaintiff, defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Bauer & Greene* and *Mr. A. H. McCurtain*, with oral argument by *Mr. Thomas G. Greene* and *Mr. McCurtain*.

For respondent there was a brief over the names of *Mr. Guy C. H. Corliss* and *Mr. Roscoe F. Hunt*, with an oral argument by *Mr. Corliss*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. Defendant's first assignment of error relates to the court's refusal to grant a change of venue based upon the prejudice of the trial judge. The motion for a change of venue was supported by the affidavits of A. H. McCurtain and A. F. Flegal, Jr. From their affidavits it appears that after the decision by this court of the former appeal and prior to the latest trial the judge, speaking of this case, among other remarks, used substantially the following language:

"This case may be tried again, and it will be tried before me. I will see to that. And I will see that the woman gets another verdict and judgment that will stand."

And further:

"The woman got bumped, and now you have bumped her again. But I'll see that the next time this case is tried somebody else will be bumped."

2. There were no counter-affidavits filed, and we must take the contents of these affidavits as admitted.

It needs no argument to convince an impartial person that the trial judge had prejudged the issues of this cause, and that he ought not, in the face of the record, to have undertaken the trial thereof. As is said in the case of *State ex rel. v. Board of Education*, 19 Wash. 8 (52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317):

“To compel a litigant to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and insists that he will adhere to it, no matter what the evidence may be, would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression ‘administration of justice.’ ”

It is true, as suggested by counsel for respondent, that a careful examination of the record fails to disclose any indication of bias or prejudice in the subsequent trial, but we approve what is said in the case of *Massie v. Commonwealth*, 93 Ky. 588 (20 S. W. 704):

“But, it is said, the record, so far as the judge’s rulings are concerned, indicates no hostility or prejudice against the appellant. But that is not the question; for the accused has the right to be tried by a judge that is fair and impartial, and when he has good reason to believe, supported by facts, that he will not afford him such trial, he should not be compelled to take chances of a trial before that judge in order that the truth of the matter may be developed, * * because there are many ways that a partial or prejudiced judge may knife a party that he is trying without it appearing from the record or without his being able to ascertain the fact. So, when the fact is made to appear by proper affidavits, the judge should then vacate, and it is a reversible error if he does not.”

3. The other assignments of error relate to the following instruction given by the court:

“And now, gentlemen, if you should come to the conclusion that the plaintiff in this case is entitled to damage, she is entitled to such a sum at your hands as will reasonably compensate her for any pain of a physical kind which she may have endured and for any mental disquiet which may have come to her as a result of those physical injuries. If you think that she will still continue in the future to endure pain of a physical kind, or mental disquiet, by reason of the injury which she has received, you are entitled to take these matters into consideration, and [if] you should be of the opinion that she has been permanently injured, you may also take that into consideration, and award her such a sum of money for the pain, for the suffering, physical and mental, past and future, as you think she is entitled to recover.”

Defendant contends that this instruction is erroneous for several reasons. We shall consider but one.

4. Upon the former appeal in this case, *Rugenstein v. Ottenheimer*, 70 Or. 600 (140 Pac. 747), this court, speaking through Mr. Justice BURNETT, says:

“The amount of damages, like other elements of a personal injury case, is a fact to be established by the testimony. The determination of that question is not to be left to mere surmise or speculation. The verdict on that point should be the result of a careful consideration and comparison of all the evidence in the case. Instead of permitting them to give what they thought, the court should have told the jury to allow for damages, if anything, the amount established by a preponderance of the evidence.

This, of course, became the law of the case for all future proceedings, and, since the instruction quoted disregards this principle, it is error.

The judgment of the lower court is reversed and the cause remanded, with directions to assign the cause

for trial to some other department of the Circuit Court for Multnomah County. REVERSED AND REMANDED.

MR. JUSTICE EAKIN did not sit.

MR. JUSTICE BEAN delivered the following dissenting opinion.

I think the instructions to the jury, taken as a whole, are correct. This is the second appeal of the case, and it should be affirmed under the provisions of Article VII, Section 3, of the Constitution, which was enacted by the people for the purpose of preventing numerous appeals in a case.

Argued October 26, modified November 16, rehearing denied December 14, 1915.

HAINES COMMERCIAL CO. v. GRABILL.

(152 Pac. 877.)

Mines and Minerals—Liens—Foreclosure—Complaint—Sufficiency.

1. A complaint to foreclose liens for materials and labor on mining property, which alleges that plaintiff, at the request of defendant, the owner, and codefendant operating the mine, acting through a third person, their duly authorized agent, worked as an underground miner at an agreed wage per day, earning a specified sum, leaving unpaid a specified sum; that the services performed by plaintiff were performed in the working, development and operation of the property; that plaintiff, to perfect a lien, filed and caused to be recorded in the office of the county clerk in the county his claim and notice on May 4th, while the work was completed on March 31st preceding; that the claim and notice of lien contained the name of the lien claimant, a true statement of the claim and demand, after deducting all just credits, the name of the owner and reputed owner of the property, the name of the person by whom claimant was employed, a description of the property charged, a true statement of the contract, and that the lien has not been satisfied, but is a valid lien, states a cause of action.

[As to who are "laborers" within the statute giving liens to laborers, see notes in 58 Am. St. Rep. 303; Ann. Cas. 1913B, 138.]

Mines and Minerals—Notice of Lien—Statutory Provision.

2. A lien notice, which complies with Section 7445, L. O. L., providing that a true statement of the demand, after deducting

credits and offsets, with the name of the reputed owner and name of the person by whom claimant was employed, with a description of the property, is sufficient, though it does not segregate the demand for overtime work.

Statutes—Title—Sufficiency.

3. The title of Laws of 1907, page 293, entitled an act to amend enumerated sections of the Code and statutes and providing for liens in favor of any person performing labor on or furnishing materials or supplies for the operation of any mine, and regulating the priority of such liens, and of Laws of 1911, page 193, entitled "An act to amend" Section 7447, L. O. L., "to provide for the priority of mortgages and for the posting and recording of the same," are sufficient, within the Constitution, to justify provisions in the body of the acts making liens superior to mortgages.

Constitutional Law—Due Process of Law—Priority of Liens.

4. A mortgagee, in a mortgage executed subsequent to the statute giving laborers and materialmen a preference, is not deprived of his property right without due process of law, because his lien is postponed to the liens of laborers and materialmen.

Mines and Minerals—Liens—Foreclosure—Personal Judgment.

5. In a suit to foreclose a lien for materials and labor on mining property, brought against the owner and a lessee operating the property, the court, granting relief, cannot render a personal judgment against the owner.

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

Three complaints were filed by the Haines Commercial Company, a corporation, the Eastern Oregon Light & Power Company, a corporation, and D. B. Rhodes, against Daniel Grabill, as trustee, and others, containing, for plaintiffs and their assignors, allegations upon 72 causes of suit, seeking to foreclose certain liens for materials and labor upon mining property owned by Highland Gold Mines Company and operated by Highland Development Company as lessee. The three suits were by stipulation merged and tried as one. The causes of suit are set out in substantially the same form, so a statement of the allegations of one will serve for all, in our consideration of the case and reads as follows:

“That during all the times and dates hereinafter mentioned the Highland Gold Mines Company, a corporation, and the Highland Development Company, another corporation, were in the actual control, and in the actual working, development, and operation of said mining property, and that R. R. McGaughey was the duly authorized agent of both of said companies in the management, working, development, and operation thereof.

“That heretofore, and on the first day of March, 1914, at the special instance and request of the above-named defendant, the Highland Gold Mines Company, a corporation, and the Highland Development Company, a corporation, acting by and through one R. R. McGaughey, their duly authorized agent for said purpose, the plaintiff began work upon said mining property, above described, as an underground miner, with pick and shovel and other usual tools used in said work, and between said dates and the thirty-first day of March, 1914, both dates inclusive, when he ceased so to work and labor, he performed $31\frac{1}{2}$ days' labor, including overtime, at the agreed wages of \$3.50 per day, earning thereby the total sum of \$110.25, no part of which has ever been paid, except the said sum of \$32.70, leaving a balance due him on account of said services from said defendants, Highland Gold Mines Company and the Highland Development Company, of the sum of \$77.55, no part of which has been paid.

“That said work, labor and services so performed by plaintiff were done and performed in the working, development and operation of the mining property hereinbefore described and all thereof, and was for the benefit of and common to all of said property.

“That on the fourth day of May, 1914, the plaintiff, for the purpose of securing and perfecting a lien for the money due him as aforesaid under said contract, upon the properties hereinbefore described, duly filed and caused to be recorded in the office of the county clerk of Baker County, Oregon, his claim and notice of lien, duly verified by him as by law required.

“That said claim and notice of lien was filed under the provisions of the laws of the State of Oregon and contained the name of the lien claimant, a true statement of his claim and demand after deducting all just credits, the name of the owner and reputed owner of the mining property, the name of the person by whom claimant was employed, a true statement of the contract under which said services were performed, a description of the property charged with the lien sufficient for identification, which claim and lien were verified by the oath of claimant. That said claim of lien has not in any way been satisfied or discharged, and the same is now a valid and subsisting lien upon said property. That plaintiff paid \$2.20 for filing and recording said lien, and that \$25 is a reasonable sum to be allowed by the court as attorney’s fees for the foreclosure of said lien.”

The defendants filed separate demurrers upon the ground that the complaint does not state facts sufficient to constitute a cause of suit. These being overruled, the defendant Grabill filed an answer which, after denying the allegations of the complaint, pleads affirmatively that the Highland Gold Mines Company is the owner of the mining property described, and had leased the same to the Highland Development Company, which had incurred all the indebtedness specified in the complaint, and that the former corporation had nothing to do with the operation of the mine. Then follows his cross-complaint, alleging that he is the mortgagee in a certain mortgage or trust deed executed by the Highland Mines Company covering the property described in the complaints for the purpose of securing the sum of \$100,000, with interest since the date thereof, March 1, 1908. He alleges that the debt thereby secured is past due and is unpaid, and prays for a foreclosure.

To this a reply was filed which, after denying that the property was operated by the Highland Development Company as lessee, admits the execution of the trust deed to defendant Grabill and that the same has not been paid. Then follow the affirmative allegations that the two defendant corporations continued to operate the mine after giving the mortgage and incurred the liabilities sued upon by plaintiffs, and that these obligations were created with the full knowledge and consent and with the active operation of defendant Grabill as trustee, and as an officer and agent of the defendant corporations. Then follow some allegations in the nature of an estoppel, and a further contention that no notice was published or recorded as required by the laws of Oregon, either upon the property or otherwise, of the existence of the mortgage or trust deed or of the lease.

The issues having been thus joined, the parties entered into a written stipulation of facts, one paragraph of which reads as follows:

“It is further stipulated and agreed by and between the parties hereto that all of the allegations set forth and contained in the complaints of plaintiffs are hereby admitted, except as to matters otherwise stated in this stipulation, as therein set forth, save and except that statement alleging it to be a fact that the liens sought to be foreclosed in said complaints are prior in time and superior in right to the lien of the mortgage held by the defendant Daniel Grabill, as trustee, which mortgage is particularly set forth and described in the answer of the defendant Grabill, as trustee, on file herein, and that the question of the priority of said liens over said mortgage, or the priority of said mortgage over said liens, is hereby reserved as a question of law to be submitted to and determined by this court, subject to appeal.”

The only particular in which the stipulation is inconsistent with the allegations of the complaint is the paragraph thereof which recites that the mine was held and operated by Highland Development Company under a lease from Highland Gold Mines Company, the owner. It is agreed that neither company ever posted or recorded any notice of the lease, and it is also stipulated that defendant Grabill never complied with the law in regard to posting any notice of his mortgage. From the decree entered in favor of plaintiffs, foreclosing their several liens, and also the mortgage of defendant Grabill, making the latter subsequent and inferior to the former, Grabill appeals.

MODIFIED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Orville B. Mount*.

For respondents there was a brief with oral arguments by *Mr. James H. Nichols* and *Mr. A. A. Smith*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. The first assignment of error relates to the overruling of the demurrer. A careful examination of the complaint, set out in the statement *supra*, convinces us that the allegations are ample to state a cause of suit. Everything that is required to be contained in a valid lien is therein alleged, and the further allegation that a notice containing the same facts had been duly filed and recorded and that the debt was still unpaid.

The second assignment is to the effect that the evidence fails to show who created the obligations mentioned in the complaint, but the latter clearly alleges that the claimant was employed by the defendant corporations, acting through one R. R. McGaughey, the

duly authorized agent for such purpose, and the stipulation of facts concedes that the plaintiff was employed by the Highland Development Company, as lessee, through McGaughey, as such agent.

2. The third assignment attacks the sufficiency of the lien notices because they do not segregate the demand for overtime work; but we do not recall, neither has our attention been directed to, any statutory provisions requiring such segregation. The statute (Section 7445, L. O. L.) prescribes the contents of the notice thus:

“A true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with such lien sufficient for identification.”

All these requirements are fully complied with in the notices sued upon.

3. The next and last assignment is based upon appellant's contention that the trust deed or mortgage is prior in time and superior to the plaintiff's liens. Appellant, under this assignment, contends that the title of the act under which the liens are claimed is insufficient to sustain the section thereof giving laborers and materialmen a preference. The original act was passed by the legislature in 1891, the title reading thus:

“An act for securing liens for laborers on mining claims, and materialmen and prescribing the manner of their enforcement”: Laws of 1891, p. 76.

This act did not contain any provision for preferring such claims, and in 1907 the act was amended under a title reading as follows:

“An act to amend Sections 5668, 5669, 5670, 5671, and 5672, of Bellinger and Cotton’s Annotated Codes and Statutes of Oregon, and providing for liens in favor of any person performing labor in or upon, or furnishing material or supplies, in or for the development or operation of any mine, lode, mining claim or deposit, yielding or containing coal, metal or mineral of any kind, or on any road, tramway, trail, flume, ditch, or pipe-line, building, structure or superstructure, in, upon, or used in connection with such mine, lode, deposit or mining claim, or for furnishing or transporting material or supplies to such mine, lode, deposit, mining claim, building, structure or superstructure, used in the operation or development thereof, or for labor performed in transporting material, or the product from such mine, lode, mining claim or deposit, prescribing duties of persons claiming exemptions therefrom, and providing penalties for the enforcement of the provisions of the act and regulating the priority of such liens, and providing the manner for the foreclosure of such liens”: Laws 1907, p. 293.

This amendment gives to such liens a priority over all other claims against the property which is subject to the liens, and the title sufficiently expresses the purpose. The act was again amended in 1911 under a title reading thus:

“An act to amend Section 7447 of Lord’s Oregon Laws, to provide for the priority of mortgages and for the posting and recording of the same”: Chapter 141, Laws 1911.

It does not require any serious argument to show that the titles of the acts of 1907 and 1911 are quite sufficient to comply with the constitutional requirement.

4. If we comprehend counsel’s further contention, it is that the act deprives the mortgagee of his property right, without due process of law, in that it enables

the owner of the mine, after mortgaging it, to contract debts for labor and materials which may absorb, by reason of the preference, all the security. It must be remembered that the act of 1907 became a law before appellant's mortgage contract was executed. In the case of *Provident Inst. v. Jersey City*, 113 U. S. 506 (28 L. Ed. 1102, 5 Sup. Ct. Rep. 612), Mr. Justice BRADLEY, speaking for the court, says:

“When the complainant took its mortgages, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after-accruing or not, is a deprivation of its property without due process of law.”

We might multiply citations of like tenor, but we deem it unnecessary. Our attention has not been called to any converse authority.

5. We note, however, that the decree of the trial court gives plaintiffs a personal judgment against the Highland Gold Mines Company, which is clearly an error.

The decree of the trial court is therefore modified to the extent of eliminating such personal judgment, and is affirmed as to the remainder.

MODIFIED. REHEARING DENIED.

Argued October 26, reversed November 23, rehearing denied December 14, 1915.

COOLEY v. SNAKE RIVER IMP. CO.

(152 Pac. 1190.)

Judgment—Conclusiveness—Issues Determined.

1. A party is bound by a judgment on all questions actually litigated or which might have been determined.

Judgment—Res Judicata—Estoppel by Judgment.

2. Estoppels by judgment must be mutual to be effective.

Contracts—Irrigation Works—Construction.

3. A contract for the construction for an improvement district of a pumping plant for irrigation purposes, which provides that no alteration shall be made in the work except on the written order of the engineer, stating the amount to be paid the contractor for the alteration, that the compensation shall be paid in money or at the option of the district in its coupon bonds previously authorized and issued, and that all coupons of the bonds due on a specified date shall be detached from the bonds and retained by the district and canceled, subject to additions or deductions for alterations, gives to the district the option to pay with bonds and permits the retention of coupons payable on the designated date, subject to additions or deductions, and the coupons constitute a fund applicable to the payment for extra work.

Judgment—Res Judicata—Estoppel.

4. An improvement district contracted for the construction of a pumping plant for irrigation purposes and deposited its bonds with a bank to be delivered to the contractor on the completion of the contract, which stipulated for extra work. The bank brought interpleader suit against the contractor and the district. The contractor alleged the completion of the contract without making any demand for extra work. The district did not demand damages for faulty construction of the system, but denied the completion of the work and alleged delay in the construction thereof. The court directed delivery of the bonds to the contractor, who thereafter brought action against the district for extra work, required to be performed under the contract, under the order of the engineer. *Held*, that the contractor sought to reopen the case to recover for extra work, and he could not complain because the district counterclaimed for damages for faulty construction of the system on the ground that the judgment directing a delivery of the bonds was conclusive on that question.

[As to *res judicata*, see note in 44 Am. St. Rep. 562.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

The plaintiff, George E. Cooley, had a written contract with the Snake River District Improvement Company, a corporation, for the construction and installation of a pumping plant for irrigation purposes, and now claims compensation for extras furnished under the terms of the agreement after having been paid, as he alleges, for the principal work specified by the delivery to him of certain coupon bonds of the defendant.

The execution of the instrument is admitted, but the defendant alleges as a counterclaim damages for faulty construction of the system by the plaintiff, whereby it is damaged in the sum of \$6,000 over and above the value of the extra work alleged by the plaintiff. It appears that at the inception of the undertaking, by agreement of the parties, the bonds were deposited with the First National Bank of Weiser, Idaho, to be delivered to the plaintiff on the completion of his contract.

Replying affirmatively, the plaintiff states with great detail the history of a suit in the nature of interpleader brought by the bank against the parties to this action in the District Court of the Seventh Judicial District of the State of Idaho. In that proceeding the bank alleged substantially that the plaintiff here had demanded of it the surrender of the bonds, claiming to have completed his contract, and that the defendant here had notified it not to deliver them, contending that the work had not yet been completed. It is stated that the Idaho court made an order directing the parties here to interplead, and that the plaintiff here set forth his claim of completing the undertaking and his right to have the bonds delivered to him; that the defendant here answered the contention of this plaintiff in that

suit denying the finishing of the work and asserting that the contractor, plaintiff here, had delayed construction of the plant beyond the time prescribed, so that the defendant district had lost the use of the same and was compelled unnecessarily to pay interest on its loan, whereby it was damaged in the sum of \$2,500, for which it is entitled under the stipulation to a lien on the deposited bonds. The reply further states that the issue of the interpleader suit was adjudicated in favor of the plaintiff here and a delivery of the bonds to him was decreed by the Idaho court.

A motion was made by the defendant here to strike out the affirmative matter of the reply giving the history of the proceedings in that litigation. This was denied by our Circuit Court. Error is predicated also of the refusal of the court to allow the defendant district to show faulty construction of the work. A verdict and judgment for the plaintiff for the full amount claimed ensued, and the defendant appeals.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. John L. Rand*, *Mr. William H. Brooke* and *Mr. Ralph W. Swagler*, with oral arguments by *Mr. Rand* and *Mr. Brooke*.

For respondent there was a brief over the names of *Mr. Ed. R. Coulter* and *Mr. Frank D. Ryan*, with an oral argument by *Mr. Coulter*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The defendant argues that the question of faulty construction was not involved in the Idaho suit, and that it is privileged to litigate that question in counter-

claim against the plaintiff's demand for extra work. On the other hand, the plaintiff urges that his right to receive the bonds depended upon his showing completion of the undertaking according to its terms; that the defendant was bound to put in all grounds of its opposition to their delivery in the interpleader suit; and that, having alleged damages for failure to finish the plant in the time required, it cannot now allege another element of injury, namely, the imperfect condition in which the system was left. In other words, the plaintiff argues that the defendant had no right to split its cause of defense in the interpleader suit, and pleads the decree of the Idaho court in that proceeding as an estoppel against the present contention of the district.

1. It is true that a party is bound by a judgment on all questions which were actually litigated or might have been determined in the proceeding; but this proves, if anything, too much for the position of the plaintiff here.

2. Estoppels by judgment to be effective must be mutual: *Furgeson v. Jones*, 17 Or. 204 (20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620); *Gordon v. San Diego*, 101 Cal. 522 (36 Pac. 18); *Freeman v. Thayer*, 29 Me. 369; *Alexander v. Walter*, 8 Gill (Md.), 239 (50 Am. Dec. 688); *Blackwood v. Van Vleit*, 30 Mich. 118; *Hempstead v. Easton*, 33 Mo. 142; *Gardner v. Sharp*, 4 Wash. C. C. 609, 9 Fed. Cas. No. 5236.

3. It is disclosed by the contract pleaded by the plaintiff in the reply as follows:

"Article III. No alteration shall be made in the work except upon the written order of the engineer; the amount to be paid by the district or allowed to the contractor by virtue of such alteration to be stated in such order. Should any alteration increase the cost of

construction or in materials, the same shall be treated as materials and force work, and to be furnished by the contractor at actual cost plus ten per centum profit to the contractor. Should the district and the contractor not agree as to the amount to be paid or allowed, the work shall go under the order above required, and in case of failure to agree, the determinations of all of said amounts shall be referred to arbitration as hereinafter provided."

In the same instrument Article VIII reads thus:

"It is mutually understood and agreed that the sum to be paid by the district to the contractor for said work, materials and removal of fences shall be forty-two thousand five hundred dollars, payable in lawful money of the United States, or, at the option of the district, in its coupon bonds heretofore authorized and issued, bearing date May 1, 1912, in denominations of five hundred dollars each, bearing interest at the rate of six per centum per annum, payable semi-annually as evidenced by coupons attached thereto; it being distinctly understood however that all coupons of said bonds due and payable to the first day of May, 1913, are to be detached from said bonds and by the district retained and properly canceled, subject to additions or deductions as hereinbefore provided, and that such sum shall be paid by the district to the contractor, either in such money or bonds, at the option of the district, and only upon the certificate of the engineer, as follows. * * "

Other details in this subdivision refer to the times of payment and discharge of liens which are not important here.

4. It thus appears that it was optional with the district to pay its obligation with its bonds, and that the coupons payable May 1, 1913, were to be retained subject to the additions or deductions otherwise provided in the contract. The proper construction of this provision is to make those coupons a fund applicable to

the payment of extra work. In the Idaho suit the effort of the plaintiff was to obtain possession of the bonds as payment for his services. It was as obligatory upon him to do the extra work provided in Article III, as to perform any other condition of the agreement, and, so far as his right to the bonds depended upon performance of his engagements, it was necessary for him to urge his whole contention in that proceeding. He could no more split his cause of suit there than the defendant could split its cause of defense. By the very token that he would prevent the defendant from urging a different ground of damages he himself is forbidden to plead an additional cause of action which he might have stated, if his theory is true, in the Idaho suit. If it was necessary for the defendant to state all its claims for damages in that suit or to be precluded here from relying on one not there mentioned, for the same reason the plaintiff ought to be held to have alleged all his cause of suit in Idaho. His answer in the interpleader suit, which appears in the record as one of his exhibits in this proceeding, specifically excludes any claim for extra work done under his contract. If it was incumbent upon him to allege the performance of the work originally required in order to obtain the bonds, it was equally obligatory upon him to aver what was otherwise directed by the engineer to be performed under the provisions of Article II. His complaint here amounts to a waiver of the estoppel. In other words, he attempts to open the case for the purpose of recovering for extra work, and he cannot complain if the defendant is also allowed to reopen it to put in its defense against his claim here alleged. He here demands money in face of the option of the defendant to pay in bonds. He cannot spring this new demand without

letting in any defense which was proper in the beginning. This action is tantamount to setting the estoppel at large, and his plea of the Idaho proceeding is a departure from the theory advanced in his complaint. It was consequently error under the state of the record to refuse the defendant the privilege of showing the faulty construction of the work involved in the contract.

For these reasons, the judgment of the Circuit Court is reversed and the cause remanded for further proceedings.

REVERSED. REHEARING DENIED.

Argued December 1, reversed December 14, 1915.

EX PARTE BOWERS.

BOWERS v. GRANT.

(153 Pac. 412.)

Habeas Corpus—Custody of Infant.

1. *Habeas corpus* proceedings, instituted to secure the discharge of children from alleged illegal restraint, though somewhat analogous to the ordinary application for discharge from illegal arrest, are usually contests between those claiming the custody of the child, in which case inquiry is directed as to which contestant is better fitted to have control of the infant.

Infants—Delinquent Children—Statutes.

2. Legislation creating Juvenile Courts was not designed to convict youths charged with commission of crime, but rather to control the training of neglected children; therefore, the act of the Juvenile Court, in awarding to any person custody of dependent minor is not a judgment in a criminal action.

Infants—"Dependent Child"—Juvenile Court Act.

3. Section 4406, L. O. L., defines a "dependent child" as any person under the age of 18 years who is destitute, homeless, or abandoned. Section 4407, L. O. L., which formerly conferred upon the Circuit Court of Multnomah County original jurisdiction as a Juvenile Court, because the county contained more than 100,000 inhabitants, was amended by Laws of 1915, page 177, Section 1, which gave that power to the county courts of several counties. Section 4409, L. O. L., authorizes any resident of the county to file a petition setting forth facts constituting dependency of a child, while Sections

4410, 4414, and 4415, L. O. L., provide for citation upon the petition and proceedings thereunder authorizing the court to award the care of dependent children to some reputable person. The Circuit Court of Multnomah County made a finding that a child was dependent and provided that its custody should be delivered to persons in another county. After the amendment, the county court of Multnomah County directed that custody of the infant should be restored to the mother. *Held* that, as the county which first obtains jurisdiction over an infant retains it, though the infant be carried into another county, such order of the Multnomah County Court was binding.

[As to *habeas corpus* as remedy by parent to recover child from custody of other parent, see note in *Ann. Cas.* 1912C, 868.]

From Polk: HARRY H. BELT, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a special proceeding by Mollie Bowers against Milt B. Grant, to inquire into the cause of the restraint of her daughter, Marion Bowers, who is four years old, and to secure the latter's release. The facts are that the juvenile department of the Circuit Court of the State of Oregon for Multnomah County caused to be recorded in its journal an entry which reads:

"In the Matter of MARION BOWERS, a Dependent Child.

"It appearing this 1st day of July, 1913, that the said Marion Bowers is a dependent child, in that the parents accuse each other of not being fit and proper persons to care for the child, and it also appearing that Mr. Bowers does not want the child, and that the grandparents, Mr. and Mrs. John Stump, of Dallas, Oregon, will take said child: It is ordered that said Marion Bowers be made a ward of this court, and that she be allowed to remain in the custody of the mother, Mrs. Mollie Bowers, until the further order of the court."

Pursuant to this order Marion Bowers was taken to Dallas, Oregon, by her mother, who in November, 1913, left the child with Mr. and Mrs. Milt B. Grant of that city. Mrs. Bowers about February 1, 1914, demanded possession of the child from Mr. Grant, who refused

to surrender her. The mother thereupon undertook surreptitiously to take her daughter to Portland, but her attempt to do so proved unavailing.

The County Court of Polk County, Oregon, on September 25, 1914, based upon a petition therefor, while the little girl and her mother were within that county, and with notice of the previous order of the Juvenile Court of Multnomah County, made an order which reads:

"In the Matter of MARION BOWERS, a Dependent Child.

"This day, this cause coming on to be heard, and after evidence was taken, the court took the same under advisement pending the final disposition of the cause: It is ordered that the child remain in the care of Milt Grant and wife, in Dallas, Polk County, Oregon."

The Juvenile Court of Multnomah County made another order in the matter hereinbefore referred to, as follows:

"Now on this 9th day of February, 1915, this cause coming on regularly to be heard, and it appearing to the court that Mr. John Stump, grandfather of Marion Bowers, a ward of this court, has since the entry of the last order herein, died; and it further appearing that Mrs. Mollie Bowers, mother of said Marion Bowers, a ward of this court, is at the present time in position to give such ward a good and proper home, with good surroundings, and is able to look after said ward's welfare: It is ordered that so much of that certain order made by this court and entered in this cause on the first day of July, 1913, as relates to the care of said Marion Bowers by Mr. and Mrs. John Stump; of Dallas, Oregon, be and the same hereby is revoked. It is further ordered that said Marion Bowers, a ward of this court, be allowed and permitted to remain and be in the custody of the mother, Mrs. Mollie Bowers, subject to the supervision of this court, and the officers thereof, until further order of the court. It is fur-

ther ordered that, pending further order of this court, said Mollie Bowers, mother of said ward, be and she hereby is required to personally bring said ward into this court twice each month, in order that this court, and its officers, may note the condition and welfare of said ward, from time to time. It is further ordered that said Marion Bowers shall continue as a ward of this court."

Mrs. Bowers made another demand for the possession of the child upon Mr. Grant, who refused to comply therewith, whereupon these *habeas corpus* proceedings were instituted in the Circuit Court of the State of Oregon for Polk County.

Predicated upon the petition, which is in the usual form, a writ was issued, and for return thereto the defendant stated that the child had continuously been in that county more than 18 months last past; that about November 10, 1913, the little girl was placed by her mother in the custody of Mr. and Mrs. Grant, who ever since had cared for the child; that in September, 1914, she was a dependent child whose parents had been divorced, and that her mother was not a fit or proper person to have the care of the girl, setting forth the alleged reasons for such unfitness; that while Mrs. Bowers and her daughter were in Polk County a verified petition was filed in the County Court thereof, as the juvenile department, and founded upon that application and the service by due publication of such proceedings upon the father of the child the order was made as hereinbefore quoted. For a further and separate return it was alleged that in September, 1913, and prior thereto, the little girl was a homeless child in the custody of her mother, who was dissolute, guilty of neglect and cruelty to the child, and is not a fit or proper person to have the care there-

of; that in November, 1913, the girl was placed in the custody of Mr. and Mrs. Grant, who have given her a good home and proper care.

The material averments of the return were denied, and the petitioner set forth the orders of the Juvenile Court of Multnomah County, and alleged that the order made by the County Court of Polk County is void, that the Circuit Court for that county was without authority to hear or determine the question of who is a fit or proper person to have the temporary care of the child, and that such exclusive jurisdiction is vested in the Juvenile Court of Multnomah County. These allegations of new matter were put in issue, whereupon the cause was tried and, based on the testimony taken, the proceedings were dismissed and the petitioner appeals.

REVERSED.

For appellant there was a brief over the names of *Mr. Walter L. Tooze, Jr., Mr. Charles W. Robinson* and *Mr. Walter H. Evans*, with oral arguments by *Mr. Tooze* and *Mr. Robinson*.

For respondent there was a brief over the names of *Messrs. Sibley & Eakin* and *Mr. Glenn O. Holman*, with oral arguments by *Mr. Joseph E. Sibley* and *Mr. Holman*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. *Habeas corpus* proceedings, instituted to secure the discharge of children from alleged illegal restraint, though somewhat analogous to the ordinary application of a party to be relieved from a criminal charge, is usually a controversy between the parents of such child, or between one or both of them and a stranger, in which case the real inquiry is not limited to the sole

question of jurisdiction as in criminal actions, but extends to a consideration as to which of the contestants is better qualified to have the custody and control of the minor, so as to promote his best interests: *In re North Pacific Presbyterian Board of Missions v. Ah Won*, 18 Or. 339 (22 Pac. 1105); *Rivers v. Mitchell*, 57 Iowa, 193 (10 N. W. 626). The state, as *parens patriae* and successor to the king in England, exercises by equitable proceedings a general supervision over, and is in theory the guardian of, all minors who are neglected by their parents. "The right of the state to exercise guardianship over a child," says Mr. Justice CHADWICK in *Weber v. Doust*, 84 Wash. 330, 333 (146 Pac. 623, 624), "does not depend on a statute asserting that power. Such statutes are only declaratory of the power already and always possessed by courts of chancery, and they will even now exercise that power concurrently or in aid of a statute."

2. Legislation creating Juvenile Courts is of modern origin. An enactment of that kind was not designed as a means to try, convict and punish youths charged with the commission of crimes. The tribunals so constituted are agencies of the state to direct and control the training of neglected children, placing them under favorable surroundings, in order that they may be saved from evil lives and grow up good citizens: *State v. Eisen*, 53 Or. 297 (99 Pac. 282, 100 Pac. 257); *State v. Dunn*, 53 Or. 304 (99 Pac. 278, 100 Pac. 258). The act of a Juvenile Court in awarding to any person the custody of a dependent minor, who is too young properly to select a guardian, is not a judgment in a criminal action; and the keeping of such child, pursuant to an order of that kind, is not a restraint of its liberty, but constitutes such parental care as is re-

quired and as should be exercised in behalf of young children.

Mr. and Mrs. Grant have no children of their own. They have cared for Marion Bowers as though she were their own offspring, and they are able, ready and anxious to continue properly to support, maintain, and educate her. The Circuit Court evidently considered and undertook to promote the best interests of the child when it dismissed the writs of *habeas corpus* and committed the custody of the minor to the defendant until further ordered. If the County Court of Polk County, as a juvenile tribunal, had jurisdiction of the subject matter September 25, 1914, and was authorized to order Marion Bowers returned to the custody of Mr. and Mrs. Grant as set forth in the journal entry hereinbefore quoted, the determination of the trial court would be entitled to great consideration.

3. The statute defines a "dependent child" to mean any person under the age of 18 years who, for any reason, is destitute, homeless or abandoned: Section 4406, L. O. L. Formerly the Circuit Court of Multnomah County, which contained more than 100,000 inhabitants, had original jurisdiction as a Juvenile Court: Section 4407, L. O. L. Such was the law when Marion Bowers was adjudged by that court to be a dependent child. By the amendment of that section the County Courts of the several counties of this state now have original jurisdiction in all cases, coming within the terms of the act: Gen. Laws Or. 1915, c. 147. Any reputable person, being a resident of the county and having knowledge of a child therein who appears to be dependent, may file with the clerk of the court having jurisdiction in the matter a written verified petition, setting forth the facts constituting such de-

pendency: Section 4409, L. O. L. Upon the filing of the petition a citation must be issued, requiring the person having the custody or control of the child to appear with such child at a time and place specified in the notice: Section 4410, L. O. L. When any child under the age of 18 years shall be found to be dependent or neglected, the court may make an order committing the child to the care of some reputable citizen of good moral character, and may thereafter set aside, change, or modify such order: Section 4414, L. O. L. In any case where the court awards a child to the care of any individual, according to the provisions of the juvenile law, the child shall, unless otherwise ordered, become a ward and be subject to the guardianship of the individual to whose care it is committed: Section 4415, L. O. L.

These provisions confer upon the County Court, which first secures original jurisdiction of the matter of a dependent child, the sole power to hear and determine the question. The petitioner, Mollie Bowers, and her daughter, the ward, Marion, were before the County Court of Polk County, September 25, 1914, when the order was made that the child remain in the care of Mr. and Mrs. Grant. This appearance may have conferred jurisdiction of the person of the mother and her daughter, but not of the subject matter, the right to dispose of the ward, which power remained in the Juvenile Court of Multnomah County. Courts of that kind find homes for dependent children in various counties of the state, and to permit another court to interfere with a ward when duly adjudged to be such would create interminable difficulties. An alleged dependent infant, who has, pursuant to a duly verified written petition setting forth the necessary facts, been brought before a juvenile tribunal and

found to be in need of a guardian, who is appointed, thereby becomes a ward of the court and is bound by its determination until the order has been set aside: 3 Pomeroy, Eq. Juris. (3 ed.), § 1305; *McGowan v. Lufburrow*, 82 Ga. 523 (9 S. E. 427, 14 Am. St. Rep. 178); *Lloyd v. Kirkwood*, 112 Ill. 329. In a note to the case of *Sharon v. Terry*, 1 L. R. A. 572, 573, it is said:

“Between courts of concurrent jurisdiction, the court first acquiring jurisdiction will retain it, and will not be interfered with by another court.”

This rule is so elementary as to require no further citations of authority supporting the legal principle. The Juvenile Court of Multnomah County having first secured jurisdiction of the subject matter and never having dismissed the proceedings or released the ward, the County Court of Polk County, a tribunal of concurrent power, had no authority to intermeddle with the custody of the child, and its decree attempting to affect such custody is void.

It is argued by defendant's counsel that, if an adjudged dependent child should be taken to another county by his guardian to be placed in a home, such ward might be imposed upon and suffer injury unless relief could immediately be granted by the Juvenile Court of the county in which the infant might be found. This argument is forceful, and if it were addressed to the legislative assembly an amendment of the statute, regulating the procedure in the Juvenile Courts, might possibly be secured. No power is lodged in the courts, in counties other than that in which the original jurisdiction was secured, to correct such supposed abuses, for the statute commands in general that in case of a decree in respect to the per-

sonal or legal condition or relation of a particular person such order is conclusive upon that subject: Section 756, L. O. L. If Mr. and Mrs. Grant, who, from a transcript of the testimony before us, appear to be in every way worthy, competent and qualified for the trust, desire the custody of the little girl whom they have cared for and kept for more than two years, they must apply therefor to the Juvenile Court of Multnomah County, which has exclusive jurisdiction of the subject matter.

The action of the Circuit Court in denying the petition, dismissing the proceedings, and awarding the custody of Marion Bowers to the defendant is erroneous, and in consequence thereof the judgment is reversed, and one will be entered here restoring the liberty of the ward and surrendering her to the petitioner, Mollie Bowers, until the further order of the Juvenile Court of Multnomah County in the matter. **REVERSED.**

Argued December 1, affirmed December 14, 1915.

HOEFLER v. MICKLE.*

(153 Pac. 417.)

Food—Candy—Alcohol—"Adulterated."

1. Where a manufacturer of chocolate candy containing 1.05 per cent alcohol sold it in packages whose label made no mention of the alcohol, but simply referred to the candy as "chocolates," such candy was an adulterated article of food within the meaning of Section 21, subdivision 16, of the Pure Food Law (Laws 1915, p. 565), defining the adulteration of candy, regardless of whether a food commissioner had theretofore established a standard of purity for candy as required by the act, since free alcohol is injurious and harmful to the health of partakers.

Statute—Misbranding—Validity—Certainty.

2. Pure Food Law (Laws 1915, p. 568), Section 35, subdivision 3, defining misbranded foods, is not indefinite and uncertain because

*On what constitutes adulteration within the food and drug act, see note in L. R. A. 1915B, 774. **REPORTER.**

it cannot be determined whether it refers to food or drugs, since the language of such section, when read in connection with Section 20 (page 564), is broad enough to cover both food and drugs.

Food—Pure Food Law—Construction.

3. The Pure Food Law (Laws 1915, p. 558) is remedial in its nature, and should be liberally construed.

Food—Pure Food Law—Candy—Alcohol—"Misbranded."

4. Chocolate candy, containing 1.05 per cent alcohol, but sold in packages whose label refers to the candy simply as "chocolate," without mentioning the alcohol contained, was "misbranded" within the meaning of Pure Food Law (Laws 1915, p. 567), Section 35, since alcohol is a deleterious substance.

[As to liability of manufacturer of unwholesome food to person injured by partaking of it, see note in 111 Am. St. Rep. 713.]

From Multnomah: HENRY E. MCGINN, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by H. R. Hoefler, doing business under the firm name and style "Hoefler's," against J. D. Mickle, as the duly elected, qualified and acting food and dairy commissioner of the State of Oregon, to prevent the latter from seizing and confiscating some candy manufactured by the plaintiff and styled "Centennial Chocolates." Issues were formed, and the following stipulation of facts was made and filed:

"That at and during all the several times hereinafter mentioned, plaintiff was, and now is, engaged in the City of Astoria, Clatsop County, Oregon, in the business of manufacture and sale of candy, bonbons, ice-cream, and other confectioneries under the firm name and style of 'Hoefler's.' That at and during all the several times hereinafter mentioned, defendant was and now is the duly elected, qualified and acting food and dairy commissioner of the State of Oregon, with offices at 510 Worcester Building, Portland, Multnomah County, Oregon. That for more than five years past plaintiff in the prosecution of his said business, has been and now is manufacturing and selling a certain kind or brand of candy known as 'Hoefler's Centennial Chocolates,' which candy was not, at the

time hereinafter specified, nor at the commencement of this suit, adulterated within the provisions of the laws of the State of Oregon, but does and at said times did contain rum, brandy and alcohol in such proportion that the alcohol constituted and does constitute not in excess of 1 5/100 per cent by volume of such candy, and the packages in which said candy is sold did not bear a statement on the label of the quantity or proportion of rum, brandy and alcohol contained therein, nor any label or brand showing that any rum, brandy or alcohol is contained in said candy, and that the sample of the candy box wrapper attached to plaintiff's complaint is a true and correct wrapper of the boxes in which said candy was and is now being sold. That plaintiff has been during said period of five years, and still is, conducting a profitable business in the manufacture and sale by wholesale and retail of said candies in the State of Oregon, and that said business is the principal business and source of income of the plaintiff. That on or about the 6th of May, 1915, the defendant, in his capacity as dairy and food commissioner of the State of Oregon, caused a chemical analysis of a sample of said candy to be made, which sample was of uniform quality of all such candies manufactured and sold by the plaintiff, and ascertained therefrom that said candy, contained not in excess of 1 5/100 per cent by volume of alcohol, and thereupon notified plaintiff to desist from the manufacture of such candy containing said, or any, per cent of alcohol, and that defendant would, after the taking effect of Chapter 343 of the General Laws of Oregon of 1915, seize said candy and take action against the plaintiff for violation of said act. That on the twenty-eighth day of May, 1915, defendant seized certain of said Centennial Chocolates manufactured by the plaintiff, and then in the possession of and offered for sale by the Railway Exchange Cigar Store, located in the Railway Exchange Building, between Third and Fourth Streets, on the south side of Stark Street in the City of Portland, Multnomah County,

Oregon, and immediately notified in writing the person from whose possession said candy was taken of the seizure thereof, a copy of which notice is attached to the answer in the above-entitled cause and made a part thereof. That unless restrained by the court, the defendant will continue the seizure of said candy manufactured by the plaintiff, wherever found in the State of Oregon for sale, or offered for sale, and by whomsoever kept or offered for sale, containing said amount of alcohol, rum or brandy, or any thereof, without being labeled or branded in such manner as to show the amount of brandy, rum, and alcohol, and either thereof, as provided by Sections 34 and 35 of Chapter 343 of the General Laws of Oregon of 1915, and will institute proceedings for the prosecution of plaintiff under the provisions of said chapter."

The Circuit Court dismissed the suit, and the plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Messrs. Norblad & Hesse*, with an oral argument by *Mr. Frank C. Hesse*.

For respondent there was a brief over the names of *Mr. Isaac H. Van Winkle*, Assistant Attorney General, and *Mr. George M. Brown*, Attorney General, with an oral argument by *Mr. Van Winkle*.

MR. JUSTICE BURNETT delivered the opinion of the court.

This litigation arises under the pure food law of February 26, 1915. According to the prevalent fashion of Oregon legislation involving boards and commissions, the act first provides for salaried commissioner and deputies, chemists and agents. This important purpose of the enactment having been accomplished, it takes up the subject of food, defining it thus in Section 20:

"The term 'food' as used herein, shall include all articles used for food or drink, or intended to be eaten or drank by man, whether simple, mixed or compound."

The preceding section declares that:

"No person shall within this state manufacture for sale, have in his possession with the intent to sell, offer or expose for sale, or sell, any article of food which is adulterated within the meaning of this act."

It is said in Section 21:

"An article shall be deemed to be adulterated within the meaning of this act: (1) If any substance has been mixed with it so as to lower or depreciate, or injuriously affect its quality, strength or purity. * * (7) If it contains any added substance or ingredient which is poisonous or injurious to health. * * (16) Candy containing terra alba, barytes, talc, chrome yellow, or any other mineral substances, poisonous color, or flavor or other ingredient injurious or detrimental to the health of consumers": Laws 1915, p. 564.

It is also made unlawful for any person, firm or corporation to manufacture, sell or offer or expose, or have in possession with intent to sell within this state, any article of food which is misbranded within the meaning of the act. Section 35 says:

"The term 'misbranded,' as used herein, shall apply to all articles of food or articles which enter into the composition of food, the package or label of which bears any statement, design, or devise regarding such article, or the ingredients or substance contained therein which shall be false or misleading in any particular and to any food product which is falsely branded as to the state, territory, county or country in which it is manufactured or produced. That, for the purpose of this act, an article shall be deemed to be misbranded: (1) In case of drugs: If its package or

label shall bear or contain any statement, design or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent. (2) If it be an imitation, or offered for sale under a distinctive name of another article. (3) If it be labeled, branded, or placarded so as to deceive or mislead the purchaser, or purport to be foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, formaldehyde, saccharine, salicylic acid, boric acid, alpha or beta eucaine, cannabis indica, chloral hydrate, acetanilide or any derivative or preparation of any such substances, or any other poisonous acid or substance. * * (5) If the package or its label shall bear any statement, design or device regarding the ingredients or substance contained therein, which statement, design or device be false or misleading in any particular; provided, that an article of food which does not contain any added poisons or deleterious substance shall not be deemed to be adulterated or misbranded in the following cases: (1) In case of mixtures or compounds which may be now or from time to time known as articles of food, under their own distinctive name, and not an imitation of or offered for sale under a distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the name and address of the manufacturer and the place where said * * articles labeled, branded or tagged so * * blends, and the word 'compound,' 'imitation,' or 'blend' as the case may be, is plainly stated on the package in which it is offered for sale * * ": Laws 1915, p. 567.

In the earlier sections of the act the commissioner is required to make uniform rules and regulations for the purpose of carrying out and enforcing the provisions of the act and cause them to be published in the

quarterly bulletin established by the statute. It is further enjoined that from time to time the officer shall adopt and establish standards of quality, purity and strength of articles of food, liquor and drinks, for which no standards are prescribed by law, and such standards so adopted and established shall in no case be higher than those provided by the United States Department of Agriculture; and the same are also to be published: Sections 13 and 14. The label alluded to in the pleadings and stipulation has on it the words, "Hoefer's Centennial Chocolates, Astoria, Oregon," and a device, resembling a seal, inscribed, "Hoefer's Registered 1811—1911, Astoria, Oregon, Home of the Centennial Chocolates."

1. The questions to be determined are whether the defendant has in possession with intent to sell or distribute an adulterated article of food or one which is misbranded. The object of the act is to promote purity of food products and to protect the public against deception in such articles. To this end the law has denounced adulterations and deceptive labels. In such cases as the one in hand, for instance, a parent buying candy for his children has a right to know whether it is indeed pure confectionery or a mixture of sugar and whisky or other intoxicating liquor. Chocolate, a product of cacao seeds roasted and ground and often mixed with sugar, is a harmless article of food and, if true to the label admitted in this suit, would not be harmful to anyone. On the other hand, if it contains an ingredient "injurious or detrimental to health of consumers," as mentioned in subdivision 16 of Section 21 of the act, or, as stated in subdivision 5 of Section 35 on misbranding, if it contains "any deleterious substance," it is misbranded within the meaning of the act. Alcohol is classified by

all toxicologists as a poison. Considered in the light of legislation from the foundation of the state to the present, it is a substance deleterious to health. It has always been under the ban of the law as an enemy to the physical welfare of the people. Without reference to whether or not a food commissioner has established a standard of purity for the article of food called "candy," the fact that the confection in question contains 1 5/100 per cent of alcohol is sufficient to bring it within the sixteenth subdivision of Section 21, defining an adulterated article of food, for the simple reason that free alcohol is injurious and harmful to the health of anyone who partakes of it.

2. It was strongly pressed upon us at the hearing that Section 35 on the subject of misbranding is indefinite and uncertain, and particularly that it is impossible to determine whether the third subdivision relates to drugs or to food. By its own terms the section is made to apply to all articles of food. Referring to the earlier Section 20, we find the term includes all articles used for food or drink, or intended to be eaten or drank by man, whether simple, mixed or compound. This definition is wide enough to include within its terms drugs which are intended to be taken inwardly by individuals. In the statutory sense, therefore, such drugs are food, and for the purposes of Section 35, construed with Section 20, it matters not whether subdivision 3 be applied to the bread of the baker, the candy of the confectioner, or the drugs of the doctor.

3. The label "Centennial Chocolates" is innocent enough on its face, and indicates ordinary chocolate candy. In this case it is a misbrand within the meaning of the statute, because it does not state the proportion of alcohol contained in the product it incloses.

The statute is remedial in its nature, and should be construed to effectuate the purpose intended.

4. The stipulation of facts measured by this enactment discloses that the article in question was not only adulterated, but also misbranded, rendering the plaintiff amenable to the law and the activities of the commissioner as described in the pleadings. The decision of the Circuit Court was right, and is affirmed.

AFFIRMED.

MR. JUSTICE ELAKIN did not sit.

Argued September 23, affirmed October 13, rehearing denied December 21, 1915.

RAMASWAMY v. HAMMOND LUMBER CO.*

(152 Pac. 223.)

Master and Servant—Pleading—Sufficiency of Reply.

1. In a servant's action for injury from dangerous and unguarded machinery, where the master pleaded contributory negligence and assumption of risk, a reply alleging that the control of the power was not visible from the place where plaintiff was injured, that he worked in a dangerous place only because ordered to work there, that he had no knowledge as to the manner of operating the machinery or of the dangers and risks of going underneath a sorting table in the sawmill, that he did not negligently place his hand or sleeve into the cogwheels, and denying that his injury was in any way due to his negligence, was a sufficient denial of the affirmative defenses.

Master and Servant—Negligence—Employers' Liability Act—Contributory Negligence.

2. Under Employers' Liability Act (Laws 1911, p. 16) contributory negligence is not a defense, but may be taken into account by the jury in fixing the damages.

*An analogous discussion of Employers' Liability Acts will be found in notes in 47 L. R. A. (N. S.) 38, and L. R. A. 1915C, 47, on constitutionality, application and effect of Federal Employers' Liability Act.

As to acquiring jurisdiction over foreign corporation by service of process, see note in 70 L. R. A. 532.

REPORTER.

Master and Servant—Master's Liability—Assumption of Risk.

3. The defense of a servant's assumption of risk is not available in an action coming within the provisions of the Employers' Liability Act (Laws 1911, p. 16).

Pleading—Judgment on Pleadings—Denial of Immaterial Allegation—Reply.

4. Where the defenses of contributory negligence and assumption of risk pleaded were not available, though the reply thereto was insufficient, there was no error in refusing judgment on the pleadings, since a denial of an immaterial allegation raises no issue.

Venue—Transitory Action—Personal Injury.

5. An action for damages resulting from personal injuries is a transitory, and not a local, action.

Corporations—Foreign Corporations—Process—Statute.

6. Under Section 6726, L. O. L., requiring every foreign corporation before doing business in the state to execute a power of attorney and record it with the Secretary of State, empowering some resident, as its attorney in fact, to accept service of all process necessary to give complete jurisdiction to any court of the state, the appointment is made for the whole state; and in a servant's action for injury received in C. County, where the defendant's agent for process resided, service upon him there gave the Circuit Court of M. County jurisdiction, since jurisdiction of a foreign corporation may be obtained by the Circuit Court for any county by summons upon the resident agent, regardless of his residence or where the cause of action arose.

[As to designation by foreign corporation of agent to accept service, see note in 85 Am. St. Rep. 926.]

Corporations—Foreign Corporations—Process.

7. Where a state prescribes the conditions upon which foreign corporations may do business and a method whereby its courts may acquire jurisdiction by process upon its designated agents, a corporation subsequently doing business in the state is deemed to consent to such conditions, and to be bound by the prescribed process.

Appeal and Error—Harmless Error—Pleading—Election.

8. In a servant's action for personal injury, where the complaint asserted the cause of action in four ways differing in respect to the machinery, whether it was in motion or was started after plaintiff commenced work, and as to the protection of the cogwheels, and the defendant before trial moved that plaintiff be required to elect, that the court required him to elect only after the close of plaintiff's evidence was not prejudicial to defendant.

Master and Servant—Action for Injury—Evidence—Machinery.

9. In a servant's action for injury from dangerous and unprotected cogwheels in a sawmill, evidence for plaintiff of a mechanical engineer who had visited the sawmill and examined the sorting-table where plaintiff was injured and observed the manner in which it was operated was admissible, where the operation was approximately the same as when the machinery was run before, and where a diagram of the sorting-table and the machinery showing the cogwheels was in evidence.

Evidence—Master and Servant—Expert Evidence—Machinery.

10. In a servant's action for injury from the dangerous and unprotected cogwheels in a sawmill, where defendant did not claim that the place of work was not dangerous, but that plaintiff's disregard of his duties caused the injury, expert testimony of a mechanical engineer who had worked in several similar places that the place under the sorting-table where the cogwheels moved was dangerous was inadmissible.

Appeal and Error—Harmless Error—Admission of Evidence.

11. In a servant's action for injury, where it appeared that he was 21 years of age, and where the complaint alleged that he was capable of earning \$2 per day by manual labor, \$50 per month as a stenographer, that he was a graduate of a university, and upon completion of his electrical course might earn from \$3,000 to \$10,000 a year, temporary admission of evidence tending to show the salary of a mechanical engineer to be \$3,000 per year and over was not prejudicial to defendant, in view of an instruction not to consider what plaintiff might earn after education for a profession.

Master and Servant—Dangerous Place to Work—Evidence.

12. In view of Employers' Liability Act (Laws 1911, p. 16), Section 2, providing that the manager or foreman in charge of construction or operation should be the agent of the employer in all suits for damages for injury to an employee, evidence in a servant's action for injury, where there was a dispute as to whether he was directed to work where he was injured, to the effect that the defendant's foreman had told him that if he did not like the job he could leave, was admissible as tending to show where plaintiff was required to work.

Witnesses—Cross-examination—Scope.

13. In a servant's action for injury from unguarded machinery in a sawmill, defendant introduced a certificate of the state labor commissioner, dated about one year before the injury, that the mill was properly equipped and the machinery protected as required by law, which certificate, under Section 5046, L. O. L., was only *prima facie* evidence of the condition of the sawmill at its date, and where the deputy commissioner testified that he had inspected the mill about a year later, about four days before the accident, it was proper cross-examination to show by the witness that he would not have then passed the mill for renewal; the defendant upon redirect being entitled to show that the defective condition referred to related to other machinery than that in question.

Master and Servant—Instructions—Contributory Negligence.

14. In view of the Employers' Liability Act (Laws 1911, p. 16), declaring contributory negligence to be no defense, defendant's requested charge that its negligence could not be presumed from the accident, but that plaintiff must show it was caused by defendant's sole negligence without plaintiff's own negligence, was properly modified by adding that, if it was solely the plaintiff's fault, and not his contributory fault, he could not recover.

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

The plaintiff, Krishna Ramaswamy, instituted this action in the Circuit Court for Multnomah County against the defendant, the Hammond Lumber Company, a corporation, to recover damages for a personal injury inflicted upon him while he was in the employ of the defendant. Verdict and judgment went for the plaintiff in the sum of \$6,500. Defendant appeals.

The defendant is a foreign corporation organized and existing under the laws of the State of New Jersey. At the time of the institution of this action its principal office and place of business was at Tongue Point, Clatsop County, Oregon, where it operated a sawmill with certain machinery therein. In his complaint plaintiff describes the accident resulting in the injury in four separate causes of action differing somewhat in the narration of the occurrence. Upon the trial he elected to rely upon the second cause of action, the substance of which as to the allegations of negligence is as follows: That defendant's machinery was dangerous to operate or to work near, and should have been securely covered and protected to the fullest extent that its operation would permit, but that defendant willfully and negligently failed to cover and protect it; that in the course of the operation thereof it was necessary for the safety of persons working near the dangerous machinery that there be provided a system of communications by means of signals for prompt and efficient communication between them and the employees, which system defendant negligently failed to provide; that part of the machinery consisted of cogwheels which were uncovered and unprotected; that about October 15, 1912,

plaintiff was employed by the defendant as a laborer in and about the sawmill; that defendant, with willful negligence and disregard for the safety of plaintiff, by its foreman, Thomas Penny, ordered him to clean up a quantity of sawdust which had accumulated under and around a place in the sawmill in the vicinity of the dangerous machinery and cogwheels, which were not then in motion; and that in pursuance thereof plaintiff began to do the work as directed, when the defendant willfully and negligently suddenly started or caused to be started, without warning or signal to plaintiff, the dangerous machinery and cogwheels in the vicinity of which plaintiff was working, whereupon the unprotected cogwheels caught the sleeve of the right arm of plaintiff's coat, pulling his right arm between said cogwheels and mangling the same, necessitating the amputation thereof.

Robert S. Shaw, the statutory agent of defendant, resided at Tongue Point, Clatsop County, Oregon, where the cause of action arose, which place was specified in the power of attorney appointing him and filed in the office of the Secretary of State. Service of summons and complaint was had upon defendant by serving the same upon its statutory agent in the above-named county.

The defendant made a special appearance before the Circuit Court by a motion to quash the summons and the return thereof. This motion was based upon the ground, as shown by affidavit, that the action was commenced and prosecuted in the wrong county, and therefore the Circuit Court had no jurisdiction of the cause of action or of the defendant. The court overruled this motion, and held that by the service of the summons jurisdiction was acquired over the defendant. The defendant then filed its answer, in which it

pleaded practically the same state of facts disclosed by the motion and affidavit as a special plea in abatement to the further prosecution of the action.

To this the plaintiff interposed a demurrer, which was sustained by the court upon the ground that said plea did not state facts sufficient to constitute "abatement of plaintiff's complaint." Defendant stood upon such plea, and interposed a plea in bar, paragraph 1 of which, after asserting the corporate character of defendant and that it was licensed to do business in Oregon and engaged therein in Clatsop County, alleged the following, in effect: That in the operation of said mill a considerable portion of the lumber cut was at the time of the accident automatically placed upon a sorting-table and by endless chains passed thereon to carriers for distribution; that the sorting-table was operated in sections by electric power, the controls being alongside thereof, the main table being about 300 feet in length, 12 feet in width, and elevated about 8 feet above the floor upon which it was constructed; that on each side thereof was an elevated platform about 3 feet above the floor, leaving a clear space underneath the table of about 5 feet and ample room for any person attempting to pass thereunder in the exercise of any care whatever, but that no employee was required to work thereunder, and could get under said table only by crawling; that at the time complained of about 15 of defendant's employees were working around the sorting-table under the charge of one foreman; that prior to the accident plaintiff had been in the employ of the company many months working around the sorting-tables, and had full notice and knowledge of the manner of its operation and its dangers, and as to the manner of its construction and of the machinery and appliances underneath the same,

and of the dangers, risks and hazards of going under the table, and that it was no part of plaintiff's duty to do so; that plaintiff wrongfully and negligently, in violation of the duties of his employment, and without notice to or knowledge of the defendant, voluntarily went underneath the table, and so carelessly and negligently conducted himself that he placed his hand, sleeve or clothing into the cogs of the cogwheels, which were rapidly revolving, and in plain view and fully protected, that his hand caught therein, and he thereby met with the accident, and not otherwise; that the accident was caused solely by the carelessness and negligence of plaintiff.

Paragraph 2 of the defendant's plea in bar alleges that plaintiff was skilled in the work in which he was engaged, and fully understood and appreciated the ordinary dangers, risks and hazards of the same and assumed all the risks and dangers thereof.

A sample of the plaintiff's reply to paragraph 1 is as follows:

"Plaintiff alleges that the control of the electric power by which the section of the sorting-table under which plaintiff was injured was operated was not visible from the place where plaintiff was at the time he received his injuries; and plaintiff alleges that the place where he was ordered to be by the defendant, which was the place where said injuries were inflicted upon him, was a dangerous place and known to be such by defendant; and plaintiff alleges that he was in such dangerous place only because he was directed to go there and work there, as stated in his complaint, by order of defendant; and plaintiff denies that he had been in the employ of defendant for many months and had been during said time working in and around said sorting-table, or that he had full or any notice or knowledge as to the manner of construction and operation of said sorting-tables or of the ma-

chinery and appliances underneath the same, or of the dangers, risks, and hazards of going underneath said table or tables; and plaintiff denies that he wrongfully, carelessly or negligently, or in violation of the duties of his employment, and without notice to or knowledge of defendant or its servants and employees, or any of them, went underneath said sorting-table and so carelessly and negligently conducted himself that he carelessly and negligently placed his hand, sleeve or clothing into the cogs of the set of cogwheels which were underneath said sorting-table, which said cogwheels were rapidly revolving and in plain view or fully protected. But, on the contrary, plaintiff avers that defendant, with willful and gross recklessness, carelessness, negligence, and disregard for the safety of plaintiff, ordered and directed plaintiff to go in the vicinity of the dangerous machinery and cogwheels, * * which were not then in motion."

Then follows a reiteration of the description of the condition of the cogwheels and the direction of the defendant to plaintiff. The reply contains the following somewhat general denial:

"And plaintiff denies that said injuries were in any way due to or caused by his carelessness or negligence, or by any violation of the duties of his employment, but alleges that said injuries were caused solely and entirely as set forth in plaintiff's complaint in this action."

The other allegations of paragraph 1 and paragraph 2 of the answer were traversed in much the same manner.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. George C. Fulton*.

For respondent there was a brief and an oral argument by *Mr. Hamilton Johnston*.

MR. JUSTICE BEAN delivered the opinion of the court.

It is asserted by defendant that plaintiff did not by his reply deny the allegations of its affirmative defense in bar. Before the case was called for trial defendant moved for a judgment on the pleadings upon the ground, *inter alia*, that its answer stated facts showing a complete defense and all matters set forth in the complaint, and that such facts were not denied in the reply. The court overruled this motion.

1. It will be seen that defendant pleaded contributory negligence, and also assumption of risk. While the reply thereto was not a model pleading, we think it was sufficient when we consider the general denial of any negligence on the part of plaintiff, and that it plainly appears that it was the intention of the plaintiff to deny every allegation.

2. However we may consider the matter, contributory negligence, under the Employers' Liability Act (Laws 1911, p. 16), is not a defense, but may be taken into account by the jury in fixing the damages. Consequently defendant was not entitled to a judgment on account of the defective reply, as this plea in bar did not state a defense to plaintiff's complaint.

3. As to the plea of assumption of risk, it is now well settled that such a plea is not available as a defense in an action coming within the provisions of the Employers' Liability Act.

4. Therefore, although the reply was bad, there was no error in refusing to allow the motion for judgment on the pleadings. A denial of an immaterial allegation raises no issue: *Graham v. Coos Bay R. & N. Co.*, 71 Or. 393 (139 Pac. 337, 340).

The motion to quash and the plea in abatement of defendant presented the same question; namely, the

right to sue a foreign corporation in any other county than the one in which the cause of action arose or the one in which it has its office and principal place of business, when the resident agent resides in the same county as such office is located.

5. An action for damages resulting from personal injuries is transitory, and not a local action: *Shmit v. Day*, 27 Or. 110 (39 Pac. 870). Prior to the enactment of 1903 providing for the appointment by a foreign corporation of an attorney in fact, there was no express statutory regulation of the manner of service of the summons upon a foreign corporation, except by publication thereof according to the provisions of Section 56, L. O. L.

6, 7. The act of 1903 (Section 6726, L. O. L.) provides, among other things, that every foreign corporation, before transacting business within this state, shall execute and acknowledge a power of attorney, and cause the same to be recorded in the office of the Secretary of State, appointing some person who is a citizen of the United States and a citizen and resident of this state as its attorney in fact, which shall authorize and empower such attorney—

“to accept service of all writs, process, and summons, requisite or necessary to give complete jurisdiction of any such corporation, joint-stock company, or association to any of the courts of this state or United States courts therein, and shall be deemed to constitute such attorney the authorized agent of such corporation, joint-stock company, or association, upon whom lawful and valid service may be made of all writs, process and summons in any action, suit, or proceeding, commenced by or against any such corporation, joint-stock company, or association, in any court mentioned in this section, and necessary to give such court complete jurisdiction thereof.”

The question raised by the learned counsel for defendant has not been passed upon by this court. The nearest approach to the same was in the case of *Cunningham v. Klamath Lake R. Co.*, 54 Or. 13 (101 Pac. 213, 1099), in which, however, the conditions were different from those in the case at bar. The general rule which we think is applicable is stated in Beale on Foreign Corporations, Section 295, as follows:

“Where an agent has been designated to receive service of process, that agent may be served anywhere in the state without reference to the county in which the venue is laid. If by statute a foreign corporation is liable to suit in the county in which it does business, it can be sued in no other; though, if there is no such statute, a foreign corporation, not being a resident, may be sued in any county.”

In *Thomas v. Placerville etc. Co.*, 65 Cal. 600 (4 Pac. 641), it was held that a foreign corporation doing business in the State of California had no residence within the state, and an action against it might be tried in any county designated by the plaintiff in his complaint. Private corporations are residents of the states in which they are created. They are permitted to carry on business in other states, although by both the state and federal courts they are treated as residents of the states in which they are created and nonresidents of other states: *Cunningham v. Klamath Lake R. Co.*, 54 Or. 13 (101 Pac. 213, 1099); *Boyer v. N. P. R. Co.*, 8 Idaho, 74 (66 Pac. 826, 70 L. R. A. 691). In the latter case Mr. Chief Justice QUARLES, after stating the Idaho statute, which is somewhat similar to our own, concludes by saying:

“In the absence of any statutory provision fixing the place of trial in actions against foreign corporations in any particular county, we see no reason why

such actions should not be brought and maintained in any county in this state. This, we think, is the policy and theory of our Code.”

The provisions for service contained in the act of 1903 are of mutual benefit to a foreign corporation and to litigants of the State of Oregon. Doubtless statutory service made upon a duly constituted agent would be more satisfactory than service by publication. The several provisions contained in the act apply to foreign corporations. The residence of such corporations is not changed, and they still have no legal residence within this state. It is argued with considerable force by counsel for defendant that defendant, doing business in a county in the western part of the state where the cause of action arose, should not be inconvenienced by an action in the extreme eastern part of the state. The convenience of the parties to any litigation is provided for by Section 45, subdivision 4, of L. O. L. That section provides that the court or judge thereof may change the place of trial, on the motion of either party to the action, when it appears by affidavit—subdivision 4—“that the convenience of witnesses and the parties would be promoted by such change.” An action against a foreign corporation should be commenced in some county where the convenience of the parties to the litigation would be best served; and if for any reason such action is begun where the parties and their witnesses would be discommoded, Section 45, L. O. L., should be invoked. The act of 1903 requiring the appointment of an attorney in fact upon whom process may be served in order that a court of this state may obtain jurisdiction of a foreign corporation changed the method which had prevailed prior thereto, when there was no statute upon the subject: *Cunning-*

ham v. Klamath Lake R. Co., 54 Or. 13 (101 Pac. 213, 1099), in which the former cases were distinguished.

Where a state makes conditions upon which foreign corporations may do business therein and provides a method whereby the courts of the state may acquire jurisdiction over them by service of process upon designated agents within the state, a foreign corporation subsequently doing business in the state is deemed to consent to the conditions and to be bound by the service of process in the manner specified by the state: *Gibbs v. Insurance Co.*, 63 N. Y. 114 (20 Am. Rep. 513); *McNichol v. Mercantile Agency*, 74 Mo. 457; *National Bank of Commerce v. Huntington*, 129 Mass. 444; *Millington Co. v. Pennsylvania*, 125 U. S. 181 (31 L. Ed. 650, 8 Sup. Ct. Rep. 737).

According to the provisions of the enactment of 1903 contained in Section 6726, L. O. L., in a transitory action, complete jurisdiction of a foreign corporation may be obtained by the Circuit Court for any county where an action against such corporation is commenced by service of the summons and complaint upon the resident agent appointed by the corporation, pursuant to this statute, regardless of the residence of such agent or the location of the principal office or place of business of the defendant, no matter where the cause of action arose. The language of the act quoted in part above is too broad and comprehensive to permit of any other construction, when viewed in the light of the then existing conditions and the former rulings of the courts. The appointment of such an attorney in fact is made for the whole state. The place of trial is not regulated by the residence of the agent. In case of the failure of a foreign corporation or association mentioned in the act to maintain within the state such attorney in fact the statute further provides

for valid service of process upon the Secretary of State. We conclude the Circuit Court of Multnomah County had complete jurisdiction of the defendant in this action.

8. Before any evidence was offered in the court below the defendant filed a written motion requesting the court to require the plaintiff to select which cause of action he expected to rely upon for recovery. At the close of the evidence in chief the court directed the plaintiff to make such selection. The plaintiff had one right of recovery. The defendant complains that the complaint asserts the cause of action in four ways. The main differences between plaintiff's so-called causes of action were in regard to the machinery, whether it was in motion at the time plaintiff proceeded to do the work, or whether it was started after he commenced the same, and respecting the protection or covering of the cogwheels. The initiatory pleading is not in accordance with the spirit of our Code. In drawing the complaint the pleader seems to have been in doubt as to how the evidence would develop the matter. This would naturally be explained when the story was told in a simple way on the witness-stand, and, as the trial court at the close of plaintiff's evidence directed him to elect upon which description of the matter or cause of action he would rely, we fail to see how the defendant was prejudiced. We discern no conflict with the rule in *Harvey v. Southern Pacific Co.*, 46 Or. 505 (80 Pac. 1061).

9. The plaintiff called as a witness in his behalf one Frederick Claude De Guare, who testified that he was a mechanical and electrical engineer; that on Saturday, July 26, 1913, he visited the sawmill of the defendant in Clatsop County, Oregon, at the place where it was claimed the plaintiff met with the accident, and

examined the sorting-table where it was claimed plaintiff was injured; that he observed the manner in which it was operated, accurately measured it, and took the measurement of the cogwheels, shafts and pulleys thereof in the section which controlled the operation of such machinery. Thereupon he was asked the following question:

"Now, Mr. De Guare, did you measure the dimensions of these various wheels, the diameters, and did you also the speed of the revolutions of this pinion, * * when you were there?"

"A. Yes; I measured that speed in so far as it was possible to measure it under those conditions."

Over the objection and exception of defendant's counsel to the question, "And what was the speed, as you measured it?" the witness answered:

"This pinion [indicating] ran approximately at a speed of 300 revolutions a minute. This shaft [marking the other gear] runs slower."

Defendant assigns the admission of this evidence as error. It would seem that the witness observed the ordinary operation of the machinery. The indications were that the operation was approximately the same as when the machinery had been run before. A diagram of the sorting-table and the machinery showing the cogwheels was introduced in evidence. Plaintiff testified that the drawing accurately represented the exact condition of the machinery under the sorting table at the time he was hurt. This testimony objected to appears to have been some evidence for the guidance of the jury in determining as to the danger in working about the machine. There was but little doubt but that the work involved a risk or danger. There was no error in admitting the evidence.

10. The witness De Guare identified the drawing of the sorting-table made by him. He stated that he was 25 years old, a mechanical engineer of 8 years' experience, and had worked in similar places and in machine-shops. Over the objection and exception of defendant's counsel the witness was then permitted to testify that from his experience and knowledge of machinery he regarded that point under the sorting-table where the chains and cogs moved dangerous. Upon this error is predicated. This was not practically a controverted question. It was not the position of defendant that the place where plaintiff was injured was void of danger, but that the plaintiff went to work there in disregard of his duties, plainly implying that in so doing there was a hazard. It is a matter of common knowledge that if one's limb comes in contact with such cogwheels when in motion it will be hurt. We see no reason why expert evidence would aid the jury in this matter. We believe the only effect such testimony could have had was to convince the jury that counsel for plaintiff had but little confidence in their ordinary intelligence, and that the evidence did not influence the result. It was admitted with an instruction to the jury that such testimony was for the purpose of aiding them, but was not to be substituted for their judgment. The court charged the jury upon this point as follows:

"The laws of this state require that all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of such machinery permits. It will therefore be your duty to determine, first, whether or not the gearing in which plaintiff claims he was injured, accordingly as it was located, was dangerous, within the meaning of the laws of this state. The law, although it requires in positive terms that all dangerous machinery must be fully covered and protected to its fullest extent, fails not only

to say what machinery is dangerous or what character of protection is necessary in order to fulfill the requirement to the fullest extent, etc. These matters are left to the courts and juries to determine under the well-recognized general rules of law pertaining to this subject. The question as to whether or not this gearing, as it was situated, in reference to its surroundings, was or was not dangerous within the meaning of the law, is a question of fact for you to determine, the same as any other fact in this case. The defendant in this case was bound to cover and protect only such machinery as a reasonably careful and prudent man, with full knowledge of the situation before an accident occurred, and one who would himself be liable for damage in case of error in that regard, would consider dangerous. A machine might be a dangerous machine in one location and not dangerous at all in another location, or dangerous under certain surroundings, and not dangerous in others; and what would be a covering and protection in one case would not be sufficient in another, and, if remotely situated, it might not be required to be covered at all. Therefore, it is for you to determine from the evidence in this case whether or not a reasonably careful and prudent man, with full knowledge of the situation before the accident occurred, would have considered this a dangerous machine, or dangerous to the defendant's employees.

* * Now, if you find it was dangerous, you must then determine whether it was securely covered and protected to the fullest extent that its proper operation permitted. Even if it were dangerous, yet if it were securely covered and protected to the fullest extent that its proper operation permitted, that is, to the extent that an ordinary careful, prudent, and experienced man, with full knowledge of the situation, and who himself would be liable in damage in case of error, would have considered it before the accident, and the plaintiff met with the injury complained of without any fault or negligence on the part of defendant, then the plaintiff, of course, cannot recover in this action."

We decide that under the circumstances the admission of this evidence was not reversible error.

11. Several of defendant's assignments of error relate to evidence pertaining to the earning capacity of plaintiff. Paragraph 7 of the second cause of action in the complaint alleges:

"That at the time of said injuries he [plaintiff] was capable of earning by manual labor \$2 per day, and as a stenographer \$50 per month; that he was a student of electrical engineering, having been matriculated as a student in the University of Washington at Seattle, Washington; and that upon the completion of his professional studies he would have been capable of earning from \$3,000 to \$10,000 per year."

The evidence of plaintiff and witness De Guare tended to show that plaintiff was a Hindu, 21 years of age, earning \$2 per day, as a common laborer, with an expectancy of 41.53 years. Over the objection and exception of defendant, evidence was admitted tending to show the salary of a mechanical engineer to be \$3,000 per year and over. It appears to have been given for the purpose of showing the general ability of plaintiff. At defendant's request the court instructed the jury that, if they found for plaintiff, in determining the amount of damages, "you have no right to take into consideration anything that the plaintiff might or could earn as an electrical engineer or what his earnings might be should he have educated himself as such. This is too remote and speculative, and is not an element of damage that you, as jurors, have any right to take into consideration."

The question of earning capacity is a difficult one. If plaintiff had made such advancement in his duties as to indicate that he was not dull or lazy, but capable of learning and energetic, it might have some bearing

upon the amount he would probably earn in his chosen calling. There is also a chance that a man may lose his position if he has one, and that he may obtain employment if he is out of it. We see no harm in informing the jury how much "pep" the plaintiff had. The fact that the plaintiff when injured was working as a common laborer at \$2 per day would not prevent him from pleading and proving that he was skilled in another trade and capable of earning more: *Brown v. Oregon W. R. & N. Co.*, 63 Or. 409 (128 Pac. 38); 13 Cyc. 143, note; *Chicago etc. Ry. Co. v. Long*, 26 Tex. Civ. App. 601 (65 S. W. 882); *Missouri etc. Ry. Co. v. St. Clair*, 21 Tex. Civ. App. 345 (51 S. W. 666). Under the allegations and circumstances the trial court could not be expected to weigh and segregate all the evidence before it was given. Under the charge to the jury, which was at the time commended by the learned and experienced counsel for the defendant as the best he had ever heard, and in view of the amount of the verdict, it does not appear that the rights of defendant were prejudiced by the temporary admission of the evidence of which complaint is made.

12. Exception was taken to the testimony of plaintiff detailing a conversation between him and Mr. Penny, the defendant's foreman, at the time of the injury. After referring to the genealogy of each, the material part was as follows:

"I asked him, 'Why did you give me a job like this?' And he said, 'I thought it was easy for you.' * * I told him that I had meant to ask for a change of job, and he asked me what would I do with it, and he told me that if I didn't like this job he would check my time and I could go out."

There was a conflict in the evidence as to whether plaintiff was directed to work where he did at the time

of the injury. Penny was not an ordinary or general agent of the defendant company, but was the only man connected with the company who had authority over plaintiff. He was the sole authorized agent for the purpose of doing the particular acts or transactions which are alleged to have been the negligence of which complaint is made. The matter appears to have been within the knowledge and scope of his authority. The statement was made during the continuance of the agency and in regard to a transaction still pending. In the language of the foreman it will be noticed that he spoke in the present tense. The evidence was competent as tending to show where the plaintiff was required to work.

It is enacted by Section 2 of the Employers' Liability Act that:

"The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee."

See *Northern Pac. Lumber Co. v. Willamette Mill Co.*, 29 Or. 221 (44 Pac. 286); Jones, Evidence, §§ 356, 356b, 357; Labatt, Master & Servant, § 2544.

In regard to this matter Penny himself testified that he did not tell the plaintiff not to go under the table at any time.

13. After the plaintiff had rested his case the defendant called as a witness on its behalf C. H. Gramm, deputy labor commissioner and factory inspector of Oregon, who identified a certificate issued by the state labor commissioner certifying that, in his judgment, the sawmill, planing-mill, and lath-mill where the plaintiff claimed he was injured was properly equipped, and that the machinery and appliances

therein were suitably covered and protected as provided by law. The certificate was dated October 16, 1911. The witness testified that he had inspected the mill on October 11, 1912. On cross-examination counsel for plaintiff asked this witness the following questions:

"Q. For what purpose did you inspect that mill on October 11, 1912?"

"A. On October 11, 1912, I inspected it to see that it complied with the inspection law, and to see that it was in condition so that those certificates could be renewed on the 16th of October."

Over the objection and exception of counsel for defendant to the question, "Did you find that mill in such condition that you could pass it for renewal?" the witness answered, "No."

The certificate of the labor commissioner was *prima facie* evidence only of the condition of the mill on October 16, 1911. It was not a finality in this respect: Section 5046, L. O. L. It was proper cross-examination for plaintiff to counteract this evidence if he could by showing whether or not the same conditions existed on October 11, 1912, four days before the accident. The question was general in its nature, and so was the evidence contained in the certificate identified and explained by this witness. Upon redirect examination the defendant would have been entitled to have shown that the conditions referred to by the officer related to other machinery than that in question in this case. There was no error in this ruling.

14. Defendant requested the Circuit Court to charge the jury that:

"The negligence of the defendant cannot be presumed from the happening of this accident to the plaintiff; but, in addition to proving the accident, the plaintiff

must also establish by a preponderance of the testimony that such accident was caused by the sole negligence of the defendant and without fault or negligence on the part of the plaintiff; otherwise the plaintiff cannot recover at all."

The court modified this by the following instruction:

"If this was solely the plaintiff's fault, not his contributing fault, but his sole fault, there can be no recovery by him."

Defendant saved an exception to the modification. The instruction, as requested, would have precluded plaintiff from recovery if he negligently contributed to the injury. Therefore the modification was necessary and proper in order to conform the same to the Employers' Liability Act, under which contributory negligence does not preclude recovery in such an action. Taken in connection with the other instructions, the charge complained of correctly informed the jury as to the law.

The case was fairly tried, and the verdict is supported by the evidence.

We find no reversible error in the record, and the judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS concur.

Argued October 27, affirmed November 23, rehearing denied December 21, 1915.

SOMERS v. HANSON.

(153 Pac. 43.)

Pleading—Written Instrument—Attachment.

1. Where a copy of any writing, designated as an exhibit, or otherwise sufficiently identified in a pleading, is attached thereto, the effect of the instrument so displayed is the same as though it were incorporated in the body of the pleading.

Bills and Notes—Action on Note—Complaint—Surplusage.

2. Where a copy of the note on which suit was based was attached to the complaint as an exhibit, allegations in the complaint as to the legal effect of the instrument are surplusage, and should be disregarded; it being the duty of the court to determine the instrument's effect from its averments.

Principal and Agent—Notes—Persons Liable.

3. Defendant, who signed a note, "Hanson Bros., by Erastus Hanson," cannot be held personally liable, it not being alleged that Hanson Bros. was a partnership of which defendant was a member, for defendant's signature was that of an agent of a disclosed principal.

[As to accommodation notes made or indorsed by agents or partners, see note in 31 Am. St. Rep. 754.]

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This action was commenced by F. P. Somers in the Justice's Court of Wallowa County, and appealed by defendant, Erastus Hanson, to the Circuit Court. The initiatory pleading, as far as deemed material herein, reads:

"Comes now the plaintiff, by leave of court first had and obtained, and files this, his amended complaint, and for cause of action against the defendant says: That on the seventeenth day of August, 1914, at Enterprise, Oregon, for value received, the defendant and one Thomas Hanson made and delivered to plaintiff and A. S. Allen their joint and several promissory note in writing of that date, wherein they promise to pay to plaintiff and said A. S. Allen, 90 days after

date thereof, \$50, with interest after date at 8 per cent per annum. * * That said A. S. Allen sold and delivered, without indorsement, all his interest in said note to this plaintiff prior to the bringing of this action, and plaintiff is the owner and holder of the whole of said obligation, no part of which has been paid, and is long since past due and is owing from said defendant, Erastus Hanson, to this plaintiff, and that he has refused to pay the same or any part thereof, though plaintiff has made demand for payment of same of him. That a copy of said note is hereto attached, marked 'Exhibit A,' and is made a part of this complaint. That prior to the commencement of this action said Thomas Hanson died. * * "

The exhibit thus referred to is as follows:

"\$50.00. Enterprise, Or., Aug. 17th, 1914.

"Ninety days after date, without grace, I promise to pay to the order of A. S. Allen and F. P. Somers fifty dollars, for value received, with interest after date at the rate of 8 per cent per annum until paid. Principal and interest payable in United States gold coin at Enterprise, Oregon. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action.

"HANSON BROS.,
"By ERASTUS HANSON."

A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was overruled, and, the defendant declining to plead further, judgment for the sum demanded was rendered against him, and he appealed to the Circuit Court for that county, where the issue of law thus raised was retried, the judgment reversed, the demurrer sustained, and the action dismissed, from which latter judgment the plaintiff appeals to this court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. O. M. Corkins*.

For respondent there was a brief and an oral argument by *Mr. Daniel W. Sheahan*.

Opinion by **MR. CHIEF JUSTICE MOORE**.

1, 2. The question to be considered is whether or not the complaint shows that the defendant incurred a personal liability by signing the promissory note sued upon. When a copy of any writing, designated as an exhibit, or otherwise sufficiently identified in a pleading, is attached thereto and thus becomes a part thereof, the effect of the instrument so displayed is the same as though it were incorporated in the body of the pleading: *Caspary v. Portland*, 19 Or. 496 (24 Pac. 1036, 20 Am. St. Rep. 842); *Riley v. Pearson*, 21 Or. 15 (26 Pac. 849); *McLeod v. Lloyd*, 43 Or. 260 (71 Pac. 795, 74 Pac. 491). The note must therefore be read in connection with and as a part of the complaint in order to determine the averments thereof. Thus construing the language of the initiatory pleading, it will be read as alleging that "the defendant and one Thomas Hanson made and delivered to plaintiff and one A. S. Allen a promissory note of which the following is a copy," setting it forth.

In *Woods v. Town of Prineville*, 19 Or. 108, 110 (23 Pac. 880, 881), Mr. Justice STRAHAN says:

"There are two modes at common law of bringing any writing upon the record by pleading; one was to set it out *in haec verba*, and the other was to plead it according to its legal effect; and this rule remains unchanged by any provision of our Code."

When the contract sued upon is set out *in haec verba*, it will be so construed that its legal effect will

be recognized. If the writing is thus declared upon, it is superfluous to state what its legal effect is: 4 Ency. Pl. & Pr. 918. If there be any discrepancy between the averments of a pleading and the terms of a writing properly identified or attached to a statement of facts constituting a cause of action or a defense, the language of the exhibit will control in determining its legal effect: 31 Cyc. 563; *Patrick v. Colorado Smelting Co.*, 20 Colo. 268 (38 Pac. 236); *Lewy v. Wilkinson*, 135 La. 105 (64 South. 1003). The promissory note having, in effect, been set forth in the complaint in the exact language employed in the negotiable instrument, the allegation of the legal effect of the writing as stated in the pleading must be disregarded as superfluous and variant.

3. In the notes to the case of *Gavazza v. Plummer*, 42 L. R. A. (N. S.) 1, 3, it is observed:

“A signing in which the name of the principal is followed by the name of the agent separated by the word ‘by’ or ‘per’ is uniformly regarded as a proper method of executing the agency so as to impose no personal liability upon the agent.”

It is not alleged in the complaint herein that “Hanson Bros.” were partners and the defendant was a member of that firm, so as to explain the meaning of the phrase “by Erastus Hanson,” when appended to the promissory note; nor is it averred that by thus subscribing his name he intended personally to be obligated to pay the sum to become due on the instrument, so as to render testimony relating thereto admissible. In the absence of these necessary averments, it will be implied that the defendant, having signed the name of a disclosed principal, did not intend to become personally liable. The complaint did not

state facts sufficient to constitute a cause of action, and no error was committed as alleged.

It follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE HARRIS took no part in the consideration of this case.

MR. JUSTICE BEAN delivered the following dissenting opinion.

I am unable to concur in the opinion of the learned Chief Justice. I think the defendant is liable upon the note described in the complaint, but for a different reason from that suggested upon the argument or in the opinion.

Plaintiff alleges plainly that on the date named, for value received, defendant and Thomas Hanson made and delivered to plaintiff and A. S. Allen their joint and several promissory note in writing, wherein they promised to pay to the payees 90 days after date thereof \$50, with interest at 8 per cent per annum; that Allen sold and delivered without indorsement all his interest in the note to plaintiff, who is the owner and holder thereof, no part of which has been paid; that Thomas Hanson is dead. A copy of the instrument is attached to the complaint. The allegations show a complete liability of defendant, and upon the demurrer are deemed admitted to be true. In *Waggy v. Scott*, 29 Or. 386, 388 (45 Pac. 774, 775), Mr. Justice MOORE said:

“The first ground of the demurrer admitted the truth of the probative facts alleged, and if the whole or any part of the complaint can be resolved into a cause of action, the general demurrer is unavailing to challenge its sufficiency”—citing authorities.

The controversy arises as to the copy of the note exhibited with the complaint, which shows that it was executed in the name of "Hanson Bros., by Erastus Hanson." There can be no question but that Erastus Hanson could act for himself. The only necessity for the pleading to show that he was authorized to make the note, either as a partner of Thomas Hanson or otherwise, would be in order to show the liability of Thomas Hanson or his estate; but that question is not in the case; therefore the matter of agency is not material.

Taking the allegations of the complaint as true, and considering the copy of the instrument (which was not necessarily attached), it appears, in legal effect, so far as the liability of Erastus Hanson is concerned, as though the note had been signed "Erastus Hanson, by Erastus Hanson." The fact that the words "by Erastus Hanson" were added to the signature of the principal would not free such principal from his obligation; in other words, the defendant should not be held liable as an agent, but by reason of the fact that he is admitted to be a principal maker of a joint and several promissory note. As to the signature "Hanson Bros.," it may be said that the only purpose for requiring the name of the maker of a note to appear on the face thereof is to ascertain his identity and to evidence his intention to execute it. This may be attained by the use of any other means of identification than the name. The Hansons could properly execute the instrument in the name of "Hanson Bros.," whether they were partners or not. It is not indispensable that the exact or full name should appear. The initials are sufficient, and any mark which the party uses to indicate his intention to bind himself by a promissory note will be as effective as his signa-

ture. Taking the whole of the complaint, it is thought that it fairly shows that the note was executed by the makers in the name of "Hanson Bros.": Tiedeman, Com. Paper, § 12; 1 Daniel, Neg. Inst., § 74; *Bank v. Spicer*, 6 Wend. (N. Y.) 443.

The judgment of the lower court should be reversed.

Argued October 28, affirmed November 30, rehearing denied December 21, 1915.

RUSH v. SCHOOL DISTRICT NO. 5.

(153 Pac. 59.)

Schools and School Districts—Contracts—Construction of Buildings—Liability.

1. Plaintiff contracted with defendant to build a school building for a specified sum, and agreed that no extras should be added except upon the signed order of the architect. The defendant had been authorized to issue bonds in the sum of \$50,000 to pay for the improvement. After deducting the sum of the plaintiff's original contract, there was less than enough money remaining from the sale of the bonds to pay for the contracts entered into in the construction and for extras ordered by the architect of the plaintiff. *Held*, that plaintiff could recover for the extras furnished, since he had a right to rely on the school board's keeping further expenditures, aside from his contract, within the appropriation, and as his contract was valid when executed, action of the board in exceeding the appropriation in other details could not prevent his recovery.

[As to conclusiveness of decision of architect or engineer under working contract, see note in *Ann. Cas.* 1913A, 180.]

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is an action by G. H. Rush against School District No. 5 of Union County, Oregon. The facts are as follows:

The citizens of School District No. 5, Union County, voted for the issuance of bonds to the amount of \$50,000, for the purpose of building and furnishing a

schoolhouse. The sale of the bonds realized the sum of \$50,203.77. Various sums were thereafter expended for a building site and incidental expenses, leaving a balance of \$47,412.21 in the fund on March 18, 1911, at which time the board of directors of the district entered into a contract with plaintiff for the erection and completion of a school building, with the exception of the plumbing, heating and ventilation. The amount stipulated to be paid to plaintiff therefor was \$35,940. Article III of the contract contains the following:

“No alterations shall be made in the work except upon written order of the architect; the amount to be paid by the owners or allowed by the contractor by virtue of such alterations to be stated in said order.”

Thereafter a contract was let to another party for the plumbing and heating and ventilating plants, in the sum of \$10,650. During the construction of the building the plaintiff was directed by the architect, in written orders, to do certain extra work amounting to \$3,013.33, making his total claim \$38,953.33, and this was paid, except the sum of \$2,020.33, for the recovery of which this action is brought. It appears from an examination of the record that the total amount, including the interest, derived from the sale of the bonds was \$51,348.13, all of which has been expended, and that plaintiff's claim herein, and a small portion of the indebtedness incurred for plumbing, heating and ventilating, remain unpaid. From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief with oral arguments by *Mr. R. J. Kitchen* and *Mr. James D. Slater*.

For respondent there was a brief with oral arguments by *Messrs. Crawford & Eakin*.

MR. JUSTICE BENSON delivered the opinion of the court.

The principal contention of defendant is that the legal voters had authorized the issue and sale of bonds to the extent of \$50,000, the proceeds of which were to be expended in the erection of a school building, that any greater indebtedness incurred thereon is *ultra vires*, and that therefore plaintiff cannot recover in any event. Counsel for defendant concede that a contract which is valid at the time of its execution cannot be invalidated by subsequent events over which plaintiff has no control, but insists that this doctrine has no application to the facts of this case; that the sum of \$47,412.21 was not available at the time plaintiff's contract was executed, because the contract for plumbing, heating and ventilating to the extent of \$10,650 should have been deducted therefrom, and in support of this position relies upon the authority of *Turney v. Bridgeport*, 55 Conn. 412 (12 Atl. 520). We have examined this case very carefully, but do not find that it supports that contention. The court, speaking by Mr. Justice STODDARD, says:

"The plaintiff contracted with a committee named by a written contract, wherein the resolution of the town was recited in full; and he contracted to build and finish the schoolhouse according to certain plans and specifications, except the heating, ventilation, and plumbing, for the sum of \$42,250. The plaintiff either knew, as matter of fact, the amount of the contract price for the part of the work excepted in his bid, or at least was put upon inquiry, and could easily have ascertained the amount, and must be treated as contracting with reference to the actual contract expense

of such excepted parts of the work. * * He places his right to recover a sum above the sum appropriated upon two general theories: First, that the committee in question, or the board of education, or both bodies acting in reference to the matter, have made another and different contract with him, by which they promised, and bound the town, to pay a sum above the \$55,000 for the construction of the schoolhouse, and that, acting under that new and different contract, he has expended about \$26,500 above his original contract price."

It will be seen at once that in that case the plaintiff's own contracts far exceeded the total appropriation, and, further, it must be inferred that the contract for plumbing, etc., was already in existence at the time when plaintiff's agreements were entered into. The respondent could not be expected to contract with reference to facts and conditions which were not then in existence. Since at the time when he executed his agreement with the board, including the extra work referred to therein, there were still several thousand dollars in the fund, in excess of his compensation, he had a right to expect the board of directors to keep their further expenditures within the appropriations. We conclude, therefore, that plaintiff's contract was valid at the time it was executed, and that the subsequent action of the board of directors in exceeding the appropriation in other details cannot prevent plaintiff's recovery.

The views expressed herein render it unnecessary to discuss the other questions submitted.

The judgment of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE EAKIN did not sit.

Submitted on briefs December 9, reversed December 21, 1915.

FRETLAND v. CANTRALL.

(153 Pac. 479.)

Judgment—Vacation—Mistake—"Discretion."

1. The discretion accorded the trial judge by Section 103, L. O. L., to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, is a legal discretion, to be exercised in accordance with the spirit of the law and in a manner to subserve, and not defeat, the ends of justice.

Judgment—Bar—Nonsuit.

2. Plaintiff failing to appear at the trial, and no good reason for final determination of the cause being shown, the appropriate remedy of defendants, if desiring a judgment, is by nonsuit, as provided in Section 182, subdivision 3, L. O. L., which, by provision of Section 184, does not bar another action for the same cause; and not by judgment for defendant.

Judgment—Setting Aside—Mistake.

3. A jury being impaneled when, by mistake or misunderstanding as to date of trial, counsel for plaintiff were absent, and a judgment for defendant, instead of one of nonsuit, being granted, on the mere swearing of a witness, without any evidence being elicited, it was an abuse of discretion not to grant relief therefrom under Section 103, L. O. L.

From Klamath: GEORGE NOLAND, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action by Mello Fretland against Roscoe E. Cantrall and S. T. Summers for damages. The cause being at issue was set for trial on June 12, 1915. It was reached and called for hearing on June 14th, defendants and their counsel appearing, but neither the plaintiff nor his counsel being present. The court suggested that defendants' counsel ask for a nonsuit, but the latter requested a jury, which was impaneled. The bailiff of the court, being called and sworn as a witness for defendants, stated that he knew nothing about the case. Thereupon counsel insisted on a directed verdict for defendants, which was granted and rendered accordingly, and judgment entered

thereon for costs. On June 18th, Mr. Lionel R. Webster appeared for the plaintiff, and by leave of court filed a motion supported by affidavit for an order relieving Fretland from the judgment rendered against him, and granting a trial for the reason that the same was taken through his mistake, inadvertence and excusable neglect. This motion being denied, plaintiff appealed.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED AND REMANDED.

For appellant there was a brief submitted by *Mr. M. E. Crumpacker* and *Messrs. Emmons & Webster*.

For respondent there was a brief over the name of *Messrs. Rutenic & Kent*.

MR. JUSTICE BEAN delivered the opinion of the court.

It appears from the record that Messrs. Crumpacker & Covert, of Portland, as attorneys for plaintiff, commenced this action. A cause of action is asserted in the complaint. Defendants did not ask for any affirmative relief. On May 8, 1915, the clerk of the Circuit Court wrote the above-named attorneys that the case was set for trial on June 12, 1915, or as soon thereafter as reached. On May 17th they wrote the clerk in regard to an earlier or later date of trial, and, probably relying upon memory, stated that they were advised that the cause was set for June 15th. The clerk immediately answered, calling attention to the correct date. Early in June, Mr. Crumpacker requested Mr. Webster, of Portland, who was about to visit Klamath Falls, to appear for plaintiff in the cause, which he agreed to do. Mr. Crumpacker was of the impression that the case was set for June 16th,

and so wrote Mr. Webster, asking him to procure a continuance of the case because of the serious illness of the plaintiff which rendered him unable to be present at the trial. Mr. Webster arrived at the county seat of Klamath County and was engaged in a murder trial in the federal court from the 10th to the 18th of June. On the 15th, he learned that the case had been called for trial, the form gone through with, and judgment entered. His affidavit shows that the judgment was entered on account of the mistake and excusable neglect of plaintiff's attorneys, who acted in good faith; that, if the case had been set for trial for June 16th, he would have appeared at that time and made application for a postponement; and that, if that had been denied, he would have taken a voluntary nonsuit for the plaintiff. At the time the cause was called for hearing, the court and counsel for defendants were not aware that anyone interested therein or any attorney who would appear for plaintiff was in Klamath Falls, although counsel for defendants made inquiry of members of the bar to ascertain who would represent him. Defendants' affidavits show that they were prepared for trial at the time set, and that they would be inconvenienced and caused expense if plaintiff were granted a trial. The affidavit on the part of plaintiff is not contradicted, nor is his good faith or that of his counsel in any way impugned.

1. Section 103, L. O. L., provides that the court may in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. The discretion accorded to the trial court by virtue of this section of the Code is a legal discretion to be exercised in con-

formity with the spirit of the law and in a manner to subserve and not defeat the ends of justice: *Hanthorn v. Oliver*, 32 Or. 57 (51 Pac. 440, 67 Am. St. Rep. 518); *McFarlane v. McFarlane*, 45 Or. 362 (77 Pac. 837); *Voorhees v. Geiser-Hendryx Inv. Co.*, 52 Or. 602, 605 (98 Pac. 324); *McCoy v. Huntley*, 53 Or. 229 (99 Pac. 932).

2, 3. Section 182, L. O. L., is as follows:

"A judgment of nonsuit may be given against the plaintiff as provided in this chapter: (1) On motion of the plaintiff, at any time before trial, unless a counterclaim has been pleaded as a defense; (2) on motion of either party, upon the written consent of the other filed with the clerk; (3) on motion of the defendant, when the action is called for trial, and the plaintiff fails to appear, or when after the trial has begun, and before the final submission of the cause, the plaintiff abandons it, or when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury."

Section 184, L. O. L., provides:

"When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause."

In *Carroll v. Grande Ronde Elec. Co.*, 49 Or. 477 (90 Pac. 903), in an action for wrongful death, defendant's motion for a nonsuit, on the ground that deceased was guilty of contributory negligence, was granted; the record entry reciting that the deceased was guilty of contributory negligence which was the proximate cause of the injury. It was held that the judgment was no bar to a subsequent action on the same cause, the only point properly decided being that plaintiff's case, as presented, was not sufficient in law to be submitted to the jury. In *Brown v. Lewis*, 50 Or. 358, 363 (92 Pac. 1058), it was held that a motion for nonsuit is the only proceeding open to defendant at the close

of plaintiff's case for insufficiency of the evidence. These cases, while not exactly in point, are somewhat analogous, and indicate the trend of the decisions in this state.

In the present case, when the plaintiff failed to appear at the trial, and no good reason for final determination of the cause was shown, the appropriate remedy of the defendants, if they desired a judgment, was that of nonsuit, as provided in Section 182, subdivision 3, L. O. L. Defendants would have been entitled to such a judgment if it had been requested. We do not hold that the trial court could not under any circumstances, as upon successive nonsuits, or when good cause is shown for the rendition of a verdict, permit one to be rendered and enter judgment. Such a case is not before us. Here, a jury was impaneled when counsel for plaintiff were absent by reason of mistake or misunderstanding as to the date of trial. A witness was sworn, but no evidence elicited. Only the form of a trial was observed. By mistake plaintiff has not been accorded a trial nor "had his day in court." Under all the conditions, we are of the opinion that the trial court erred in the exercise of its discretion in refusing to relieve the plaintiff from the judgment in question. The judgment of the lower court should be reversed and the cause remanded for a new trial.

It is stated by counsel in defendants' brief that, since this appeal was taken, defendant R. E. Cantrall has died; therefore the judgment herein will be held in abeyance for a time awaiting appropriate action in such case.

REVERSED AND REMANDED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

MR. JUSTICE HARRIS concurs in the result.

Argued December 6, reversed December 21, 1915.

HENDERSON v. TILLAMOOK HOTEL CO.

(153 Pac. 481.)

Appeal and Error—Receivers—Settlement of Accounts—Jurisdiction Pending Appeal.

1. After parties appealing from an order appointing a receiver, had filed a *supersedeas* bond, staying all proceedings in the court below, that court, pending the appeal, was without power to hear and settle the receiver's report; though where leave had been granted on the former appeal to present the question of the compensation of the expert accountants, and such items had been paid by the receiver, the proper time for their investigation was upon the hearing and settlement of the receiver's report and final account.

[As to grounds proper for the appointment of a receiver, see note in 72 Am. St. Rep. 29.]

From Tillamook: WEBSTER HOLMES, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is an appeal from an order of the trial court allowing the final report of a receiver fixing his compensation, discharging him, and exonerating the sureties upon his undertaking from further liability.

The facts are as follows: On January 16, 1914, a suit was begun by John Leland Henderson to oust the defendant P. J. Worrall from the management of the hotel owned by the Tillamook Hotel Company. On May 5, 1914, a receiver was appointed to take charge of and manage the hotel property. An appeal from such decree was taken, and, pending the same, this court on July 30, 1914, made an order directing the receiver to deliver to defendant Worrall the possession and management of the hotel, together with all the property held by him in connection therewith, and to account to him fully therefor. Thereafter, while the appeal was still pending, the lower court made an order directing the receiver to file the final report of his receivership, and later an order fixing December

3d as the time for hearing and considering the report and objections thereto. On that day defendants filed written objections setting out various reasons why same should not be approved. These objections challenge the jurisdiction of the trial court to hear and settle the account of the receiver while the appeal was pending, and paragraph 4 thereof is as follows:

“These defendants object to whatever may be filed by the receiver in a so-called final report, for the reason that this receiver has not served the same upon these defendants, and in the conduct of said receivership said receiver did not make any inventory of the property received belonging to the Tillamook Hotel Company, and said receiver has omitted to acknowledge receipt and charge himself with large amounts of personal property belonging to the Tillamook Hotel Company which he received as receiver, and in said report said receiver has not truly and accurately charged himself with the property of the Tillamook Hotel Company which he received. In said conduct of said receivership said receiver did not keep account of the persons who stayed at said hotel and rented the rooms showing the number of days which they stayed and the amount of money which they owed for staying at the hotel of the Tillamook Hotel Company, and which they paid the receiver for staying at the Tillamook Hotel; nor did he keep accurate account and report of the money received from patrons of the dining-room of the Tillamook Hotel, nor of the patrons of the bar of the Tillamook Hotel; nor did he keep accurate account and report of the money received which belonged to the Tillamook Hotel Company from the renting of rooms, dining-room and bar, nor of the supplies used belonging to the Tillamook Hotel Company in the dining-room or in the bar; but said receiver converted to his own use large amounts of supplies for the dining-room, for the bar, and money belonging to the Tillamook Hotel Company, and has not reported the same in said report. And

for these reasons these defendants object to said report, and to any settlement of said account.”

On the same day the court overruled defendant's objections without a trial of the issues raised thereby and entered the decree from which this appeal is taken.

REVERSED AND REMANDED.

For appellants there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. E. J. Claussen*, with an oral argument by *Mr. Duniway*.

For respondent there was a brief and an oral argument by *Mr. H. T. Botts*.

MR. JUSTICE BENSON delivered the opinion of the court.

We shall consider only the assignment of error based upon appellants' contention that the trial court was without jurisdiction to hear and dispose of the receiver's final report. The appellants had filed a *supersedeas* bond upon the appeal above mentioned which operated to stay all proceedings in the court below. The settlement of the final report of the receiver was inseparably connected with the issues involved in the hearing in this court, and could not safely be determined until the decree entered here should be sent down, and therefore, pending the appeal, the trial court was without power to hear and determine the matter: 23 Am. & Eng. Ency. (2 ed.) 1127; 2 R. C. L. 120. However, when a rehearing was denied upon the former appeal, leave was granted appellants to again present the question of the compensation of the expert accountants, upon the argument herein. Since it appears that these items have been paid by the receiver, we conclude that the proper time for the in-

vestigation thereof is upon the hearing and settlement of the receiver's report and final account.

The decree of the lower court will therefore be reversed and the cause remanded, with directions to hear and settle the accounts and demands of the receiver, and to take such further proceedings as may be necessary to finally dispose of the litigation.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and
MR. JUSTICE HARRIS CONCUR.

Submitted on briefs December 14, affirmed and remanded December 21, 1915.

NIEHAUS v. SHETTER.

(153 Pac. 486.)

Mortgages—Deed as Mortgage—Parol Evidence.

1. A deed absolute on its face may be shown by parol to have been intended by the parties as security for payment of money, and to be in effect a mortgage.

Mortgages—Maxim.

2. It is a maxim of the law that "once a mortgage, always a mortgage."

Mortgages—Deed as Mortgage—Laches.

3. The right to assert that a deed in form is a mortgage is not barred by laches; the grantor, and afterward his executor, remaining in possession, and paying the taxes, till agreement was made with the holder of the mortgage to pay them, pending a prospective sale, such holder not disavowing his trust or questioning that the deed was intended as a mortgage.

Mortgages—Deed as Mortgage—Defeasance.

4. To constitute a deed in form a mortgage there need not have been a written deed of defeasance.

Mortgages—Deed as Mortgage—Existence of Debt.

5. If a deed in form was designed as security for a debt at the time created, or theretofore existing and continued, it should be declared a mortgage.

Mortgages—Deed as Mortgage—Purchasers.

6. A deed intended as a mortgage should be declared such against one who, knowing it to have been given as such, took a deed, also intended as a mortgage, from the grantee in the first deed.

[As to deed, absolute in form, as mortgage, see note in 4 Am. St. Rep. 707.]

Mortgages—Full Disposition of Controversy.

7. A deed having, in a suit by the grantee to quiet title, been declared a mortgage, foreclosure should not be left to another proceeding, but had in such suit.

FROM COOS: LAWRENCE T. HARRIS, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit instituted by Mathilde Niehaus, appellant herein, against Otto Shetter and Alice Shetter, his wife, Eugene W. Shetter and Jennie Shetter, his wife, Emma Florence Williams and Ralph R. Williams, her husband, Julia Getty and R. W. Getty, her husband, and all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein, the said Otto Shetter, Alice Shetter, Julia Getty and R. W. Getty being the only respondents, to quiet title to 480 acres of land situated in Coos County, Oregon. Plaintiff alleges in substance that she is the owner in fee simple of the real estate, and that the defendants claim some interest therein.

Default was entered against some of the defendants. Otto Shetter and Alice Shetter, his wife, and Julia Getty and R. W. Getty, her husband, answered. They aver in effect that, as the devisees of Frederick Shetter, deceased, Otto Shetter and Julia Getty are the owners in fee simple of the realty described in the complaint, subject only to a lien of a deed of conveyance, which was in effect a mortgage, for the sum of \$3,000, with interest at the rate of 8 per cent per annum from April 1, 1898. The Circuit Court decreed that the defend-

ants Otto Shetter and Julia Getty are the owners in fee simple of the real property, subject to the lien mentioned, together with any taxes paid by the holders thereof. Plaintiff appeals.

Submitted on briefs under the proviso of Rule 18; 56 Or. 622 (117 Pac. xi). AFFIRMED AND REMANDED.

For appellant there was a brief submitted by *Mr. E. D. Sperry* and *Mr. James M. Koford*.

For respondents there was a brief over the names of *Mr. James M. Upton* and *Mr. Edward L. C. Farrin*.

MR. JUSTICE BEAN delivered the opinion of the court.

It appears that on August 12, 1889, Frederick Shetter and Emily G. Shetter, his wife, deeded the real property in question to one Thomas Harkins, by a general warranty deed absolute upon its face, which was intended by the parties and was in force and effect a mortgage to secure the payment of the sum of \$3,000, with interest at 8 per cent from that date. The deed was duly recorded in the records of Coos County. Frederick Shetter paid the interest accruing on the lien up to April 1, 1898, and also paid all the taxes assessed against the property up to the time of his death on April 23, 1902. In March, 1903, Otto Shetter was appointed sole executor of the last will and testament of Frederick Shetter, deceased, and thereafter continued to pay the taxes on the property up to and including the year 1905.

On December 19, 1903, Thomas Harkins and Kate Harkins, his wife, conveyed the real estate in controversy to Edward F. Niehaus, husband of the plaintiff, to secure the payment of certain advances made by

him to Harkins, amounting, as alleged in the answer, to about \$5,000. This deed was also intended by the parties to be, and was in effect, a mortgage. It is shown by the evidence that at the time of the execution of the last-named conveyance Edward Niehaus was informed by Thomas Harkins that the property was held by him as security for the lien of \$3,000 and interest. Harkins having died, his widow testified that, at the time of obtaining the advances from Niehaus, her husband, a sea captain, was about to make a voyage to Panama, and desired to obtain stores for his schooner, which necessitated the advances made by Mr. Niehaus; that pursuant to the directions of the latter she and her husband proceeded to the office of the attorney of Mr. Niehaus, in San Francisco, who prepared the deed which they signed, and also a writing, in duplicate, to the effect that when the debt incurred by Captain Harkins was paid the property should be returned. One copy was retained by Harkins and his wife, and was destroyed in the San Francisco fire. The other was left with the attorney for Mr. Niehaus. Captain Harkins did not return from his voyage. At one time Otto Shetter, as executor of the estate of Frederick Shetter, deceased, entered into an arrangement with Edward F. Niehaus, during his lifetime, for a sale of the land in question, and for a disposition of the proceeds. Niehaus claimed at the time that there was about \$6,000 due. A deed was executed by him and his wife and placed in escrow in a bank at Marshfield, Oregon. Some time afterward, no sale having been made, the deed was returned to him, with the expectation that he would make a sale thereof in San Francisco, California, and forward the balance agreed upon to the executor.

1, 2. It is a well-settled rule of law that a deed absolute upon its face may be shown by parol to have been intended by the parties as security for the payment of the debt, and that it is in effect a mortgage: *Kramer v. Wilson*, 49 Or. 333, 337, 338 (90 Pac. 183); *Elliott v. Bozorth*, 52 Or. 391, 395 (97 Pac. 632); *Grover v. Hawthorne*, 62 Or. 77 (114 Pac. 472, 121 Pac. 808); *Miles v. Hemenway*, 59 Or. 318 (111 Pac. 696, 117 Pac. 273). It is also a well-known maxim of the law that "once a mortgage, always a mortgage": *Reilly v. Cullen*, 159 Mo. 322 (60 S. W. 126).

3. Counsel for plaintiff invoke the principle of laches as a bar, citing and relying upon the case of *Raymond v. Flavel*, 27 Or. 219, 237 (40 Pac. 158), in support of their position. The facts there, however, are materially different from those in the case under consideration. In *Raymond v. Flavel*, 27 Or. 219, 237 (40 Pac. 158), the grantee, defendant, was let into possession of the land, and so remained for a great number of years, making extensive improvements, with the knowledge and consent of the grantor, the plaintiff. Here the original grantor, Frederick Shetter, remained in possession of the land and paid the taxes thereon up to the time of his death in April, 1902. Thereafter his son Otto, as executor, continued in such possession and paid the taxes up to and including the year 1905, when it appears he entered into an agreement with Mr. Niehaus whereby the latter was to pay the taxes, pending a prospective sale of the premises. It is not evident that Niehaus at any time disavowed his trust, or questioned that the deed to him, and also one from Shetter to Harkins, were intended as a mortgage.

4. The contention of counsel for plaintiff is in effect that in a case like the one in hand there must be a written deed of defeasance in order to constitute the deed a mortgage. With this claim we are unable to agree.

5, 6. In the determination of the question as to whether or not such a deed is in effect a mortgage, the legal test is this: Was a debt created, or was a pre-existing debt continued, and was the instrument designed as security? If the pre-existing debt was not extinguished, or if a new debt was intended to be created, and the conveyance was given as security, then it should be declared to be in effect a mortgage: *Bickel v. Wessinger*, 58 Or. 98 (113 Pac. 34); *Grover v. Hawthorne*, 62 Or., at page 93 (114 Pac. 472, 121 Pac. 808). When the deed from Shetter to Harkins was executed, a debt was created, and the conveyance was designed as security therefor. In the case of the conveyance from Harkins to Niehaus, the former debt was not extinguished, the same was augmented, and the deed was given as security. The evidence shows that Niehaus had actual knowledge of the condition of the Shetter-Harkins deed; therefore these deeds should be declared in effect mortgages as decreed by the trial court.

7. The lower court did not foreclose the declared mortgage, and left that matter for another proceeding. We are of the opinion, however, that the controversy should be fully adjusted in this suit. For that purpose, the cause will be remanded to the lower court, where the parties should be allowed to take all such proceedings as may be necessary to determine the amount of the lien upon the land and complete the foreclosure of the mortgage deed. The costs upon this

appeal should be paid as other costs and disbursements in the foreclosure suit. .

REVERSED AND REMANDED.

MR. JUSTICE EAKIN and MR. JUSTICE HARRIS took no part in the consideration of this case.

Argued October 15, modified November 23, rehearing denied December 28, 1915.

**NORTHERN BREWERY CO. v. PRINCESS
HOTEL.***

(153 Pac. 37.)

Receivers—Nature of Officer.

1. A receiver is a ministerial officer of the court of equity which appoints him, presumed to be indifferent to the parties of the suit; and holding the property for all parties interested; his title and possession being that of the court.

Landlord and Tenant—Covenants—Quiet Enjoyment.

2. In case of a demise, a covenant of quiet enjoyment is implied for from the fact of the letting, it will be presumed that the landlord had the right to lease, and that he agreed to protect the lessee against eviction, either by title paramount or his own acts.

[As to covenant of quiet enjoyment, see note in 53 Am. St. Rep. 113.]

Landlord and Tenant—Covenants Running With Land—Implied Covenants.

3. The implied covenant of quiet enjoyment arising in case of a lease is not in violation of Section 7105, L. O. L., declaring that no covenant shall be implied in any conveyance of real estate, for a lease of land is not a conveyance.

Landlord and Tenant—Liability for Rent—Eviction by Receiver.

4. Where, at the suit of the landlord, the tenant was evicted, and a receiver, appointed by the court, took possession of the premises, the tenant's liability for rent then ceased, and the landlord could, on foreclosure of a chattel mortgage to secure the rent, recover only that already accrued.

*Leases as within statute declaring that there shall be no implied covenants in conveyances of real property are discussed in note in 44 L. E. A. (N. S.) 1110.

On effect of partial eviction upon liability for rent, see note in 17 L. E. A. 275; 41 L. E. A. (N. S.) 430.

Chattel Mortgages—Foreclosure—Sales.

5. Where personal property, subject to a mortgage to secure rent, was sold by a receiver under foreclosure and bid in by the lessor at the full amount of the mortgage, which exceeded the amount of the rent due, the lessor is liable to a subsequent chattel mortgagee for the overplus, and the sale will not, in an analogy to sales of real property, be set aside on the ground that the purchase price exceeded the value of the goods, for sales of personalty are not ordinarily subject to redemption.

Receivers—Sales—Confirmation.

6. A receiver being a ministerial officer, his sale of mortgaged personalty must be confirmed by the court in order to be valid.

Chattel Mortgages—Rights of Mortgagee.

7. Where a note secured by chattel mortgage provided for attorney's fees in case of suit for collection, an attorney's fee allowed the holder cannot be recovered from one liable because having obtained property subject to the chattel mortgage.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by the Northern Brewery Company, a corporation, against the Princess Hotel, a corporation, Gardner F. Elliott, W. W. Wyatt, J. R. Prigmore, W. F. G. Thacher, E. F. Younger, T. J. Ward and E. F. Younger, trading as Ward & Younger, B. Lee Paget, and American Surety Company, a corporation, and T. G. Anderson, to foreclose a chattel mortgage. The plaintiff, the Northern Brewery Company, a corporation, having the right to the possession in Portland, Oregon, of a four-story building with a basement, leased the premises to the defendant, the Princess Hotel, a corporation, at a monthly rental of \$600, commencing March 1, 1909, \$625 beginning two years thereafter, and \$650 for the remainder of the term, or for six years, to end April 22, 1917, the several installments payable in advance on the first of each month. The lease provided *inter alia* that if the rent should be in arrears for the space of 15 days, the plaintiff might, at any time thereafter and while the default

continued, enter upon the premises, repossess the same as of its former estate, and expel the lessee and those claiming under it. The Princess Hotel, to guarantee the payment of a part of the rent, executed to the plaintiff its promissory note for \$5,000, payable on demand, stipulating to pay, in case suit or action were instituted to collect the note or any part thereof, such additional sum as the court might adjudge reasonable for attorney's fees. In order to secure the payment of the note, the lessee also executed to the plaintiff a chattel mortgage of all the furniture, beds, bedding, carpets, etc., used in rooms numbered 201 to 427, inclusive, in the building. This mortgage was duly recorded in Multnomah County. The Princess Hotel, prior to January 9, 1912, sublet the building and sold the mortgaged personal property therein to the defendant W. W. Wyatt, who on that day gave to the defendant J. R. Prigmore a promissory note for \$2,250, with 7 per cent interest per annum payable monthly, and also stipulated to pay at the same times \$100 on account of the principal, the first partial payment maturing April 1, 1912. That note provided, "if any of said installments are not so paid, the whole of said principal sum and interest to become immediately due and collectible," and further stipulated that in case suit or action were instituted to collect the sum due or any part thereof the maker would pay such additional sum as the court might adjudge reasonable as attorney's fees. To secure the payment of that note the maker, on January 9, 1912, executed to the payee a chattel mortgage on all the furniture, fixtures, kitchen utensils, dishes, silverware, beds, table and other linens, and everything contained in the building, which mortgage was duly recorded in that county. Prigmore sold and assigned the latter note and mortgage

to the defendant W. F. G. Thacher, who also sold and assigned the same to the defendant E. F. Younger. Wyatt on August 1, 1912, failed to pay the installment maturing at that time upon the note, whereupon Younger duly presented it to him for payment, and upon a refusal thereof gave to the indorsers, Prigmore and Thacher, notice of the default. Thereafter it was mutually agreed by the maker, indorsers, and holder of the \$2,250 note to defer the August installment until September 1, 1912, when the stipulated payments were resumed. Younger on November 15, 1912, sold and assigned that note and mortgage to the defendant T. G. Anderson, and the defendant T. J. Ward, doing business as the partners Ward & Younger, joined in the indorsement of the note in order to lend credit thereto. Wyatt, prior to January 1, 1913, sold his interest in the mortgaged property, and assigned the lease of the building to the defendant Gardner F. Elliott, who thereupon took possession of the premises. Anderson, also prior to January 1, 1913, sold and assigned the note last mentioned, and the mortgage given to secure the payment thereof, to the defendant B. Lee Paget, waiving demand and notice of nonpayment, the amount of that note on December 1, 1912, being \$1,450. The installment of \$100 and the interest on \$1,450, the remainder of the smaller note, at 7 per cent per annum for one month, which matured January 1, 1913, were not then paid, but, that day being a nonjudicial period of time, Paget, the holder of the note, did not attempt to present it for payment until the next day, when he was unable to find Wyatt, the maker. Paget, however, on February 10, 1913, gave written notice to Anderson, Prigmore, Thacher, Younger and Ward & Younger that Wyatt's promissory note, dated January 9, 1912, and bearing

their indorsements, was delinquent two monthly installments, and inasmuch as he could not make such collection, he called upon them for the payment thereof. At the same time Anderson sent a like written notice to each of the prior indorsers of the note. Paget on March 1, 1913, finally found Wyatt and made a written demand of him to pay the note, and upon the maker's inability to comply therewith he also gave another written notice to each of the indorsers of the presentment and default. Paget on April 1, 1913, believing the stipulation contained in the note, providing for accelerating the maturity thereof, was optional, again presented the negotiable instrument to Wyatt, declared to him the amount thereof then wholly to be due and demanded the payment of that sum, but, failing to obtain any part thereof, he again gave written notice to all the indorsers that demand had been made and payment refused.

This suit was commenced April 18, 1913. The complaint sets forth the facts hereinbefore stated, relating to the making of the original lease, the giving of the promissory note for \$5,000, and the execution of the chattel mortgage to secure the payment thereof, and also alleges that with the rent for that month, payable in advance, there was then due the plaintiff \$3,000, that demand therefor had been made upon the Princess Hotel and upon Gardner F. Elliott, the tenant in possession of the premises, and that each had refused to pay any part thereof. It is further averred that \$300 is a reasonable sum as attorney's fees, specified in the note, and that it was necessary that a receiver should be appointed to care for and protect the building, the mortgaged property, and the hotel business pending the litigation. The court, on April 28, 1913, with the consent of Anderson, Paget and

Thacher, but not with the approbation of Elliott, appointed Paul Dauschel, the plaintiff's treasurer, receiver, directed him to take possession of the building and mortgaged property, continue the business, and, until further ordered, to account for the proceeds thereof. Paget in April, 1913, assigned the \$2,250 note and mortgage to Anderson, who did not give any money therefor, but agreed that within a reasonable time he would pay a sum equal to the amount of the note.

The answer of the defendant Anderson, after denying some of the averments of the complaint, alleged, for a further defense and by way of cross-bill, the facts with respect to the smaller note and mortgage as hereinbefore set forth, stating there was due on that instrument \$1,450, with interest at 7 per cent per annum from December 1, 1912, and that \$300 was a reasonable sum as attorney's fees as stipulated for in that note. The prayer is for the foreclosure of the chattel mortgage and a sale of the property specified therein.

The separate answers of the defendants Younger and Ward & Younger, of Thacher, and of the American Surety Company, a corporation, need not be referred to, as the defenses thus interposed are deemed immaterial to any question to be considered herein. The defendants, the Princess Hotel, Elliott and Wyatt, though each was duly served with process, failed to appear or answer.

The averments of new matter in the several answers were put in issue by replies, and, the cause having been tried, a decree was rendered February 6, 1914, awarding the plaintiff \$5,000, the principal of the note, since the rent then due it exceeded that sum, and \$300 as attorney's fees, and commanding that the mort-

gage given to secure the payment of that note be foreclosed, and the personal property described therein be sold, as upon execution, and the proceeds arising from the sale be applied to the satisfaction of the sums awarded the plaintiff, and if any surplus remained, it be paid over to the Princess Hotel, the mortgagor, but if any deficiency remained, that the plaintiff have a decree therefor over against the latter defendant. It was further decreed that the cross-bill of Anderson be dismissed as against Prigmore, Thacher, Younger and Ward & Younger, and that they recover from him their costs and disbursements. Another decree was signed February 18, 1914, wherein the personal property was described as in the first chattel mortgage, but in all other respects no important modification was made in the preceding decree. Based upon these decrees the personal property so described was sold to the plaintiff for the sum of \$5,000. A *nunc pro tunc* decree was also made April 4, 1914, as of February 6th of that year, the time the original decree was given, awarding Anderson a recovery against Wyatt, the maker of the smaller note, and Elliott, his successor in interest, of \$1,450, with interest at 7 per cent per annum from December 1, 1912, and the further sum of \$150 as attorney's fees, and decreeing a foreclosure of the chattel mortgage given to secure the payment of that note, providing, however, that such modification of the original decree should not affect any prior proceedings had thereunder, except as to the application of the funds derived from the sale of the personal property, in the event any sum remained of the proceeds after paying the plaintiff's award. From this decree the defendant Anderson appeals.

MODIFIED. REHEARING DENIED.

For appellant, T. G. Anderson, there was a brief over the names of *Mr. Virgil A. Crum* and *Mr. Miller Murdock*, with an oral argument by *Mr. Crum*.

For plaintiff-respondent, the Northern Brewery Company, there was a brief over the name of *Messrs. Stapleton & Sleight*, with an oral argument by *Mr. Richard Sleight*.

For defendants-respondents, E. F. Younger and Ward & Younger, there was a brief over the names of *Mr. F. E. Grigsby* and *Messrs. Tucker & Bowe*, with an oral argument by *Mr. Grigsby*.

For defendants-respondents, J. R. Prigmore and W. F. G. Thacher, there was a brief over the name of *Messrs. McMenamin & Swindells*, with an oral argument by *Mr. Charles J. Swindells*.

For respondent, American Surety Company, there was a brief submitted over the name of *Messrs. Kollock & Zollinger*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. It is contended by appellant's counsel that when the plaintiff's agent was appointed receiver and took possession of the leased premises, thereby ousting the tenant, the landlord was restored to its original estate, and, this being so, no charge in excess of \$3,000, the amount of rent in arrears when this suit was commenced, could legally have been impressed on the mortgaged personal property, and an error was committed in decreeing a recovery of \$5,000, the face value of the larger note. It is insisted by plaintiff's counsel, however, that since the receiver was appointed with the appellant's consent, the rule invoked by him

is not applicable herein. It will be remembered that the defendant Gardner F. Elliott was the tenant in possession of the leased premises, April 18, 1913, when this suit was commenced, and that he did not acquiesce in the appointment of the receiver. A receiver is a ministerial officer of the court of equity which appoints him. He is presumed to be indifferent as between the parties to the suit, and holds the property committed to him in trust for all the parties interested therein; his title and possession being that of the court: *State v. Norfolk etc. R. Co.*, 152 N. C. 785 (67 S. E. 42, 21 Ann. Cas. 692, 26 L. R. A. (N. S.) 710).

"The general principle, very well settled in the books," says Mr. Chief Justice WINSLOW in *Bartelt v. Smith*, 145 Wis. 31 (129 N. W. 782, Ann. Cas. 1912A, 1195, 1197), "is that a party to the cause will not ordinarily be appointed receiver unless both parties consent, or there are special circumstances present which make such an appointment clearly for the best interest of all concerned. The reason is that the receiver is an officer of court, whose business it is to administer his trust impartially for the benefit of all concerned, and hence he should have no special interests which might influence him in his conduct of the trust in matters where his interests and the interest of any party to the action may clash."

The plaintiff herein, being a corporation, could act only by its agents, one of whom was Paul Dauschel, its treasurer. Though the defendants Anderson, Paget and Thacher consented to the appointment of a receiver, it cannot be said, from an inspection of the transcript before us, that they acquiesced in Dauschel's selection, or waived any objection they might have had against him by reason of his interest in the subject matter of the suit as the plaintiff's representative.

2, 3. The lease under which Elliott held possession of the building until he was evicted by the receiver, pursuant to the order of the court, is not before us, and hence it cannot be stated with certainty that the demise contained any express covenants on the part of the lessor. A text-writer, in discussing this subject, remarks:

“It is immaterial in all cases whether or not a lease contains an express covenant of quiet enjoyment so far as the rights of the tenant are concerned. For a covenant of quiet enjoyment is implied in every lease for a term, by whatever form of words the lease is created. In other words, from the fact of the letting together with the entry by the tenant into possession with the consent of the lessor, it will be implied or presumed, not only that the landlord had a right to lease, but that he covenanted to secure the lessee against eviction by a paramount title, as well as against his own acts, which would destroy the beneficial enjoyment which the lessee expects to have of the demised premises”: 2 Underhill, *Landlord & Tenant*, § 427.

The legal principle thus asserted does not contravene the provision of our statute that no covenant shall be implied in any conveyance of real estate (Section 7105, L. O. L.), for a lease of land is not a conveyance within the meaning of this section, and hence every demise, unless expressly negative words are contained therein, embraces an implied covenant that the lessor will protect the lessee in the quiet enjoyment for the term of the lease: *Edwards v. Perkins*, 7 Or. 149.

4. When Elliott, the tenant in possession of the building, was evicted by the receiver, pursuant to the order of the court, the consideration for the payment of any rent thereafter accruing, as long as the pos-

session of the premises was withheld from him, failed: *Osmers v. Furey*, 32 Mont. 581, 590 (81 Pac. 345). In such case he was not liable for the rent during that time: *Mariner v. Chamberlain*, 21 Wis. 253, 256. In that case, Mr. Justice DOWNER, speaking for the court, said:

“The order of a court of equity appointing a receiver and requiring a tenant to deliver possession to him, when he takes possession under it, as effectually ousts the tenant during the possession of the receiver as the execution of a writ of possession on a judgment at law; and the same effect must be given to it as a protection or defense to the tenant in an action by his landlord for rent accruing during such possession of the receiver.”

In *Yuen Suey v. Fleshman*, 65 Or. 606 (133 Pac. 803, Ann. Cas. 1915A, 1072), it was ruled that the election of the lessor to terminate a lease for the nonpayment of rent, and to eject the lessee, put an end to the term so as to release the tenant from liability for rent not due when he was ousted. Analogous to the principle invoked in the case at bar, it has been held that a receiver of a decedent's estate, who takes possession of real property under a lease to the deceased, becomes liable, but not personally, for the rent of the premises, which compensation for such use must be paid out of any funds lawfully coming to his hands: 2 Underhill, Landlord & Tenant, § 666. The tenant herein having been evicted, no charge for rent subsequently accruing could have been legally impressed by the receiver upon the personal property described in the second chattel mortgage so as to augment the amount due when possession was taken. The sum of \$3,000, so due at that time, limits the plaintiff's recovery as against Elliott, the evicted tenant, and Anderson, the holder of his chattel mortgage.

5-7. It is argued by plaintiff's counsel that though the mortgaged property at the sale thereof was bought by their client for \$5,000, such purchase price exceeded the worth of the goods by \$2,000, and, this being so, the sale should be set aside and a resale of the personal property decreed. If the sale had been of real estate, which is subject to redemption, a reason might be given for bidding the full sum awarded by the decree. A sale of personal property under an execution, or pursuant to a decree, generally transfers the legal title, and no redemption is allowed by law. A receiver being a ministerial officer, sales of property conducted by him are in effect made by the court, and must be confirmed by it in order to be valid. In the case at bar, if the furniture, etc., had been bid in for an insufficient consideration, the sale might thus have been set aside, to avoid which it is reasonable to infer that the plaintiff bid for the property nothing more than its reasonable value. Anderson is therefore entitled to recover of the plaintiff \$1,450, with interest thereon from December 1, 1912, at the rate of 7 per cent per annum. The attorney's fee of \$150, allowed him upon the foreclosure of his mortgage, should not be recovered from the plaintiff, since it was not responsible for the payment of his promissory note, and is not held liable therefor only on the ground that it has obtained property upon which that defendant had a right to rely for security.

The conclusion thus reached renders it unnecessary to consider whether or not the indorsers of the note held by Anderson are liable for the payment thereof.

The decree will therefore be modified in accordance with the view here expressed, and no disposition of the surplus of \$2,000, if any remain after discharging

Anderson's demand, will be made, since the parties entitled thereto have not appealed.

MODIFIED. REHEARING DENIED.

MR. JUSTICE BEAN and MR. JUSTICE EAKIN concur.

MR. JUSTICE HARRIS dissenting in part as follows:

The plaintiff bid \$5,000 at the foreclosure sale; the amount of the judgment now awarded to the Northern Brewery Company is less than \$5,000; and the difference between the judgment and the sum bid would ordinarily be paid into court for distribution. Anderson alone appealed. Conceding that no one has a right to complain except the appellant, and assuming that the plaintiff is answerable to Anderson to the extent of any claim held by him, but not exceeding an amount representing the difference between the bid made by the Northern Brewery Company and the judgment obtained by it, then Anderson should, in my opinion, have a judgment against plaintiff for attorney's fees, as well as for the balance of the principal and interest due on the note. If the amount bid by plaintiff, after crediting its judgment in full, was paid into court, then Anderson would unquestionably be entitled to have his judgment paid in full, or at least to the extent of the available proceeds; and the rights maintainable by Anderson should not be limited or curbed merely because the plaintiff is made directly accountable to Anderson.

Argued October 27, reversed November 23, rehearing denied December 28, 1915.

HYDE v. KIRKPATRICK.

(153 Pac. 41; 153 Pac. 488.)

Reformation of Instruments—Mutuality of Mistake.

1. Where plaintiff, suing to reform an instrument whereby he sold his stock of groceries, was not mistaken when making the contract about any of the terms included therein, he could not have a reformation thereof, since only mutual mistake of the parties will authorize correction of a written instrument.

[As to mistakes constituting grounds for reformation of instruments, see note in 117 Am. St. Rep. 228.]

Reformation of Instruments—Mistake Due to Negligence.

2. Where plaintiff's mistake, as to a term of the written contract whereby he transferred to another his stock of groceries, was the result of his own heedlessness and inattention, since, though possessed of written evidence of the data that should have been used to make up the written agreement, he neglected to avail himself of it for purposes of comparison, he could not have a reformation of the instrument.

Reformation of Instruments—Fraud.

3. Plaintiff, suing to reform his written conveyance of his stock of groceries claiming that through his transferee's fraud he had been mistaken about a term thereof, could have such reformation only if the transferee had made a knowingly false representation, which plaintiff believed, relied on and was deceived by, as to a matter relating to the contract, which, if true, would have been to his advantage, but, being false, caused him damage.

Pleading—Allegations—Conclusions—Fraud.

4. A complaint, in suit to reform an instrument for mistake of one party caused by the fraud of another which makes a mere general averment of fraud, is not good, since the facts upon which fraud is predicated must be specifically pleaded.

[As to fraud as a ground for reforming an instrument, see note in 65 Am. St. Rep. 497.]

Contracts—Contract to Pay Debt of Another—Breach—Damage.

5. Where the buyer of a stock of groceries agreed with the seller to pay the latter's debt to a grain company, the seller cannot sue for breach thereof unless through his payment of the debt himself, voluntarily or by compulsion, he has incurred damage.

ON PETITION FOR REHEARING.

Reformation of Instruments—New Contract—Power of Chancellor.

6. Where plaintiff, by suit to reform a contract for the sale of his stock of groceries, sought to recast the agreement according to what had been paid and what remained unpaid by the defendant, while the instrument drawn in question was the reduction to writing by the

parties of the contract of sale as first orally made between them, plaintiff could not have a reformation, since the chancellor cannot make a new contract taking into consideration payments or other part performance, but can only state the agreement in the terms stipulated as of the date when the original was made.

Reformation of Instruments—New Agreement—Power of Equity.

7. While, in a proper case, equity will relieve a party from a contract into which he has been inveigled by fraud, it will not construct a new agreement between the parties for such reason.

Reformation of Instruments—Mutuality of Mistake.

8. Where plaintiff orally contracted to sell his stock of groceries, and the contract was later reduced to writing, being at all times in possession of the original data upon which the agreement was based, he could not have reformation of the instrument on the ground that the writing did not correctly embody the oral agreement, since there was no mutuality of mistake; it being plaintiff's duty as an independent contracting party to see that the writing correctly stated the terms of the contract.

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by H. G. Hyde against Chauncey Kirkpatrick.

The substance of the complaint is that about January 9, 1911, the plaintiff sold to the defendant a stock of groceries, store fixtures and some active accounts due to the former in the business for which the latter agreed to pay \$5,880.17; that in the transaction it was stipulated that the defendant was to pay some debts, 20 in number, to wholesale merchants owing by the plaintiff, a list of which is set out in the complaint, including one to the Oregon Mill & Grain Company of \$535.62. He says that afterward, about March 10, 1911, the defendant requested him to execute a bill of sale for the merchandise and business included in the transaction; that accordingly the parties repaired to the office of an attorney who drew up the bill of sale to correct which this suit is brought. The allegation then proceeds as follows:

“That when the said sale was made as above alleged, on or about January 9, 1911, and when the defendant assumed and agreed to pay the wholesale accounts and creditors of the plaintiff as above alleged, there was no misunderstanding about the amounts or as to the names of the persons and firms; but the same were definitely understood, determined and agreed upon by both parties. That when the aforesaid bill of sale or contract was drawn the plaintiff had no knowledge whatever as to what wholesale accounts contained in the aforementioned list had been paid either fully or partially; and that the information given to Mr. Smith, the attorney who prepared the same, was given entirely by the defendant and that the defendant gave to him the list of persons and the amounts due of said wholesale accounts which he, the defendant, was to pay. And that at that time the defendant represented to the plaintiff and to Mr. Smith, the attorney, that any and all of the balance of said accounts mentioned in the foregoing list had been by him paid and discharged, and that of the list that the defendant had agreed to pay as hereinbefore alleged he, the defendant, had paid any and all of the remainder of said account save and except the particular accounts mentioned in said instrument. That up to said date the defendant had paid to the plaintiff in cash on account of said sale the sum of \$1,050, and had executed his note and delivered to the plaintiff for the further sum of \$500, and that said amounts was any and all of the cash or consideration that plaintiff had up to said time received from the defendant on account of the above alleged sale. That allowing the said \$500 note as a credit in favor of defendant, on the said tenth day of March, 1911, there remained due on said sale from defendant to plaintiff the sum of \$126.15, provided the defendant should pay to and discharge any and all of the obligations of plaintiff that the defendant had assumed and agreed to pay as hereinabove set out. That in supplying the information to the attorney who drew the bill of sale at said time, the defendant, either through mistake or with the intention to wrong

and defraud the plaintiff, omitted to mention to the attorney the certain of said wholesale accounts (which he had not paid), which in said instrument and by the terms thereof he agreed to pay.

"That the said instrument above referred to after the same was prepared was executed by both plaintiff and defendant, and that the following is a true and correct copy of the same:

" 'Know all men by these presents, that H. G. Hyde, party of the first part, for and in consideration of the sum of five hundred (\$500) dollars to him in hand paid by Chauncey Kirkpatrick, the party of the second part, the receipt whereof is hereby acknowledged, and for the further consideration of the payment by the said party of the second part of the following wholesale accounts at or before the time the same become due, to wit: Allen and Lewis, \$394.58; Baker City Grocery Company, \$1,998; Clossett & Devers, \$30.72; J. A. Folger & Co., \$132.35; Hills Brothers, \$254.53; North Powder Milling Company, \$118.60; Pioneer Mill, \$213.25; and Schillings, \$28.20. The party of the first part does hereby grant, bargain, sell, and set over unto the party of the second part, his heirs, executors, administrators, successors, and assigns, the following described personal property, to wit: All that certain stock of goods, wares, and merchandise in storeroom now occupied by H. G. Hyde and in warehouses used in connection therewith and used in conducting a general grocery business known as H. G. Hyde's Grocery, and being situate on Center street in the city of Baker, Baker county, Oregon. To have and to hold the same unto the said party of the second part, his heirs, executors, administrators, successors, and assigns forever. And the said party of the first part, for himself, his heirs, executors, administrators, and assigns, does hereby covenant and agree to and with the said party of the second part that he is the owner and in possession of the above-described personal property, and that the same is free from all legal claims whatsoever except those above mentioned. In witness whereof, the parties hereto have hereunto set their hands and seals this 10th day of March, 1911.' "

This contract was signed by the parties. The complaint further alleges:

"That at this time the plaintiff does not know as to what amounts and what creditors contained in said list that the defendant has paid, and that it is a fact that the defendant now denies that he assumed or agreed to pay the account of the Oregon Mill & Grain Company, which on January 9, 1911, amounted to the sum of \$535.62."

The pleading concludes with the prayer that the instrument executed on March 10, 1911, be reformed so as to read as follows:

"Know all men by these presents, that H. G. Hyde, party of the first part, for and in consideration of the sum of \$126.15 which Chauncey Kirkpatrick, the party of the second part, hereby agrees to pay to the party of the first part, upon demand, and for the further consideration of the payment by the said party of the second part of the following wholesale accounts at or before the time the same become due, to wit, the same having been heretofore assumed and agreed to be paid by the said Chauncey Kirkpatrick, a portion of said accounts the said Chauncey Kirkpatrick representing have already been by him paid."

Then is inserted the list of 20 accounts as set out as before alleged. The remainder of the document is the same as the original.

A general demurrer to the complaint was overruled. The answer denies all the allegations about the mistake and the fraud charged, and states the defendant's understanding of the transaction in conformity with the bill of sale actually executed. Other defenses are interposed, but it is not necessary to consider them.

The reply traverses the new matter in the answer. A trial was had before the court in which a decree was entered, not only reforming the contract as prayed for,

as well as in other particulars, but also giving a judgment against the defendant for the sum of \$535.62, the amount of the Oregon Mill & Grain Company's account, with interest thereon since March 10, 1911, and for costs and disbursements. The defendant appeals.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Clifford & Correll*, with an oral argument by *Mr. Morton D. Clifford*.

For respondent there was a brief and an oral argument by *Mr Woodson L. Patterson*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. In *Hughey v. Smith*, 65 Or. 323 (133 Pac. 68), the rule about the correction of a mistake in a written instrument is thus declared by Mr. Justice MOORE:

"The right of a court of chancery to reform or annul a written contract, the execution of which was induced by the fraud of the defendant, or resulted from the mutual mistake of both parties, is a well-recognized principle of equitable jurisprudence. Such being the case, the only question to be considered is whether or not the complaint herein states facts sufficient to constitute a cause of suit. The rule is settled in this state that, in a suit to reform a written instrument on the ground of misapprehension of the facts involved, the complaint must distinctly allege what the original agreement of the parties was, or point out with clearness and precision wherein there was a misunderstanding, and that such mistake was mutual and did not arise from the gross negligence of the plaintiff, or that his misconception originated in the fraud of the defendant: *Evarts v. Steger*, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *McCoy v. Bayley*, 8 Or. 196; *Foster v. Schmeer*, 15 Or. 363 (15

Pac. 626); *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811); *Meier v. Kelly*, 20 Or. 86 (25 Pac. 73); *Epstein v. State Ins. Co.*, 21 Or. 179 (27 Pac. 1045); *Kleinsorge v. Rohse*, 25 Or. 51 (34 Pac. 874); *Osborn v. Ketchum*, 25 Or. 352 (35 Pac. 972); *Thornton v. Krimbel*, 28 Or. 271 (42 Pac. 995); *Mitchell v. Holman*, 30 Or. 280 (47 Pac. 616); *Sellwood v. Henneman*, 36 Or. 575 (60 Pac. 12); *Stein v. Phillips*, 47 Or. 545 (84 Pac. 793); *Bower v. Bowser*, 49 Or. 182 (88 Pac. 1104); *Smith v. Interior Warehouse Co.*, 51 Or. 578 (94 Pac. 508 (95 Pac. 499); *Howard v. Tettelbaum*, 61 Or. 144 (120 Pac. 373).''

The plaintiff does not assert that he himself was mistaken about any of the terms to be included within the contract. It is true that he pleads that he was ignorant of whether the defendant had paid any of the accounts at the time the instrument was executed, but, as avowed in his brief, the object of the negotiation in March was to prepare a written memorial of the stipulation orally made in January, and not to make any new contract. In that view of the matter the representations of the defendant about his payments of accounts would have nothing to do with the case. They would not affect the plaintiff's knowledge of the transaction that occurred in March. In brief, while the complaint imputes mistake to the defendant in the alternative with an intent to defraud, it does not aver any mistake on the part of the plaintiff. It is only a mutual mistake of the parties that will authorize a correction of a written instrument within the rule of *Hughey v. Smith*, 65 Or. 323 (133 Pac. 68).

2. Moreover, there is nothing to show the court that the action of the plaintiff in signing the bill of sale did not arise from his pure heedlessness and inattention to his own interests, and this is condemned by the precedent last cited. Besides all this, as a matter of evidence, it is without dispute that at the time of the Jan-

nary transaction both parties made an inventory of the stock of goods and of the fixtures involved, together with a schedule of the accounts due the plaintiff which the defendant took over, and a list of the wholesale accounts against the plaintiff which the defendant was to assume. All these were preserved by each party, and at the time of the execution of the instrument in question the plaintiff had his set of those papers in his possession. Possessed of written evidence of the data that should have been used to make up the written agreement he utterly neglected to avail himself of it so that the conclusion of his negligence is inevitable.

3, 4. Neither is the complaint sufficient to reform the instrument on the ground of fraud perpetrated by the defendant. In *Anderson v. Adams*, 43 Or. 621 (74 Pac. 215, 217), Mr. Chief Justice MOORE stated the principle thus:

“To constitute a fraud by false representations, so as to entitle the plaintiff to relief, three things must occur: (1) There must be a knowingly false representation; (2) the plaintiff must have believed it to be true, relied thereon, and have been deceived thereby; and (3) that such representation was of matter relating to the contract about which the representation was made, which, if true, would have been to plaintiff's advantage, but, being false, caused him damage and injury.”

See, also, *McFarland v. Carlsbad Sanatorium Co.*, 68 Or. 530 (137 Pac. 209, Ann. Cas. 1915C, 555). It is quite as forcibly enunciated in *Leavengood v. McGee*, 50 Or. 233, 239 (91 Pac. 453):

“The rule is that the facts upon which fraud is predicated must be specifically pleaded. A mere general averment of fraud is nothing but the averment of a conclusion, and will not suffice. It presents no issue for trial, and is bad on demurrer. Such an averment

not only renders the bill or complaint demurrable, but it will not even sustain a decree."

Tested by these standard precedents the complaint does not sufficiently charge fraud upon the defendant. It is said in the pleading that the defendant "omitted to mention to the attorney the certain of said wholesale accounts (which he had not paid) which in said instrument and by the terms thereof he agreed to pay." It is impossible to understand how the defendant could omit from the instrument accounts which by the terms of the very paper itself he promised to pay. It was error to overrule the general demurrer.

5. As already stated, the court not only corrected the instrument by inserting an entirely different consideration and a list of 20 accounts stating that some of them had already been paid, but also gave judgment against the defendant for the amount of the Oregon Mill & Grain Company's account of \$535.62. *Seem*, if the defendant agreed with the plaintiff to pay the latter's debt to the Mill & Grain Company and did not keep his promise, it would be a breach of the contract for which an action of damages would lie if the plaintiff in fact were damaged. But unless the plaintiff had paid the debt himself, either voluntarily or by compulsion, he could not be injured. The complaint is utterly silent on this subject, and it is believed that nothing is alleged authorizing the court to award the plaintiff judgment for damages for a breach of the contract. The defect of the complaint as against a general demurrer obviates the necessity for a detailed analysis of the testimony of which it is enough to say it is confusing and unsatisfactory.

The decree of the Circuit Court is reversed and the suit is dismissed. **REVERSED AND SUIT DISMISSED.**

REHEARING DENIED.

Denied December 28, 1915.

ON PETITION FOR REHEARING.

(153 Pac. 488.)

MR. JUSTICE BURNETT delivered the opinion of the court.

6. The plaintiff has filed a petition for rehearing in which he restates with ability and zeal the arguments pressed upon our attention when the case was heard on appeal. Its incongruity is made manifest when we remember that on March 10, 1911, when the parties made the instrument drawn in question, they were endeavoring to reduce to writing the contract of sale orally made in the next preceding January, while the present litigation is an attempt to recast the agreement according to what had been paid and what remained unpaid by the defendant and compel him to perform the new contract. The utmost a chancellor can do in the way of correcting a mistake is to state the agreement in the terms stipulated as of the date when the original was made. He cannot make a new contract taking into consideration payments or other part performance.

7, 8. Another principle equally plain is that, while in a properly stated case equity will relieve a party from a convention into which he has been inveigled by fraud, it will never construct a new agreement upon such a basis. As pointed out in the former opinion, whether in the interim between January and March the defendant had or had not paid some or all of the accounts due from the plaintiff could not affect the terms of the original transaction in the former month which the parties subsequently attempted to reduce to writing. The plaintiff had in possession at all times all the

original data upon which the agreement was based for the transfer of the business, and it was his duty as an independent contracting party to see that the writing correctly stated the terms of the contract; for, under such circumstances, courts cannot make or unmake agreements. The complaint fails to show mutuality of mistake so essential to the exercise of that branch of equity jurisprudence. It presents no allegation justifying a rescission of the sale on the ground of fraud. Finally, under the guise of correcting a mistake, it attempts to frame a new contract materially different in terms from even what the plaintiff says was the original agreement made in January. For all these reasons the plaintiff has not stated a case for equitable relief. Something is said in the petition about an error in the opinion in statement of an allegation of the complaint. Confessedly the opinion on that point conformed to the printed abstract upon which we heard the cause and to which the plaintiff did not object. It must be admitted that, if the abstract had shown the complaint, as plaintiff's counsel says it was amended, by interlineation, the comment referred to would not have appeared in the decision; but, as it was not necessary to the result, it requires no further notice.

The petition for rehearing is denied.

REVERSED. SUIT DISMISSED. REHEARING DENIED.

Argued December 7, affirmed December 28, 1915.

**SALEM-FAIRFIELD TELEPHONE ASSN. v.
McMAHAN.**

(153 Pac. 788.)

Joint Adventures—Presumption as to Interest of Parties in Telephone Line.

1. Where the evidence was conclusive that three persons constructed a certain telephone line as a joint venture, which act created, as between themselves, a fiduciary relation analogous to a partnership, it will be presumed, where there is no evidence to the contrary, that each had an undivided one-third interest.

Corporations—Powers and Liabilities of Under Joint Ventures.

2. In the absence of a statute, a corporation cannot agree to enter into a partnership with a person, firm or other corporation, but may, under a joint venture with others, transact any business within the scope of its legitimate powers, and by reason thereof become liable on account of the fiduciary relation thus assumed, which relation is subject to dissolution, accounting and settlement in a court of equity in the same manner as all other cases of partnership.

Joint Adventures—Mutual Rights—Corporations.

3. Where the interests of two or three persons owning a telephone line as a joint venture were absorbed and taken over by a corporation, but the third party retained his interest, *held* that the assignee of the party retaining his interest was entitled to an undivided one-third interest in the line, subject to the payment of his ratable share of the operating expenses of a three-party line.

[As to joint adventure as distinguished from partnership, see note in 115 Am. St. Rep. 407.]

From Marion: WILLIAM GALLOWAY, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by the Salem-Fairfield Telephone Association, a corporation, against L. H. McMahan, in which defendant had a decree enjoining the adding of other customers to the line or from interfering therewith, and the plaintiff appeals. Affirmed and remanded for further proceedings.

AFFIRMED AND REMANDED.

For appellant there was a brief over the name of *Messrs. McNary, Smith & Shields*, with oral arguments by *Mr. John H. McNary* and *Mr. Roy F. Shields*.

For respondent there was a brief over the names of *Mr. Myron E. Pogue, Mr. L. H. McMahan* and *Mr. Woodson T. Slater*, with oral arguments by *Mr. Pogue* and *Mr. McMahan*.

Opinion by MR. CHIEF JUSTICE MOORE.

It appears from a transcript of the testimony that in the year 1898 a local telephone line was constructed northerly along a county road from Salem about ten miles by W. H. Egan and others. With their consent a branch line, known as telephone line No. 6, was built from their line northwesterly beside a public highway by A. M. La Follette, L. F. Townsend and Oliver Beers, who installed and used phones in their respective farmhouses. Several other telephone lines were also built in the same manner and connected with the line constructed by Egan and others. As the telephone poles began to decay and other repairs became necessary, a written agreement was signed March 16, 1908, by many persons using telephones on these lines, whereby they undertook to consolidate such lines into a system, to be controlled by an unincorporated society, called the Salem-Fairfield Telephone Association. This agreement, however, was not signed by either La Follette, Townsend or Beers. In order to put into effect the terms of the writing, some of the users of telephones on the several lines met, pursuant to notice, and elected seven members to constitute the board of trustees; La Follette being chosen to represent line No. 6. By-laws were adopted providing that capital stock in the association should consist of all

necessary appliances required to build, maintain, and operate a telephone system, and such stock should be divided into shares of \$25 each; that no member should be entitled to own or control more than three shares, entitling him to one vote for each share at a stockholders' meeting. The trustees were authorized to levy equal annual assessments to meet the expenses of maintaining and operating lines, not exceeding \$3.50 for each share, except in cases of emergency, when a majority of the stockholders were empowered to increase the assessment. Section 5 of Article VI of the by-laws was as follows:

“It is agreed by the undersigned stockholders that all the lines forming a part of this association shall be placed in first-class shape by June 1, 1908, at which time the same shall become the property of the association.”

Section 9 of Article V provided that:

The board of trustees “shall have authority to expel and disconnect any member who shall violate any of the rules of this association or these by-laws or who shall refuse or neglect promptly to pay any assessment or fine levied or assessed against him.”

Oliver Beers and his wife on January 13, 1909, entered into a contract with the defendant, whereby they covenanted to sell and convey to him their farm. The defendant also paid Beers the sum of \$25 for all his interest in telephone line No. 6. In conformity with the terms of the contract, the defendant immediately took possession of the premises, except such part thereof as had been leased, and began making extensive improvements. La Follette and Townsend were members of the unincorporated association, but neither Beers nor the defendant ever became a member thereof, though a share of its capital stock was

issued to Beers May 15, 1909, and after McMahan had become the purchaser of the land. At an annual meeting of the stockholders of the association a motion was regularly passed to the effect that a special meeting be called to discuss the propriety of incorporating the society, and the secretary was directed to give notice of such meeting. Pursuant thereto there was sent out a notice which reads:

“Salem, Or., June 9, 1910.

“Dear Sir: You are hereby notified that a meeting of the stockholders of the Salem-Fairfield Telephone Association will be held at the Clear Lake Schoolhouse Wednesday evening, June 15, 1910, at 8 o’clock, for the purpose of determining whether or not we shall incorporate under the laws of Oregon. You are earnestly requested to be present at this meeting.

“Yours truly,

“ALEX HAROLD, Sec.”

The minutes of the meeting, held pursuant to that notice, in referring to the question of incorporating the association, reads:

“The vote being taken, it was carried unanimously.”

Predicated upon that authorization the plaintiff was duly incorporated June 20, 1910. The corporation put up new poles and reconstructed line No. 6, and thereupon demanded payment of assessments from defendant, who refused to comply, for the reason that he was not a stockholder of the plaintiff, but chiefly because other phones had been added to the line which he asserts was exclusively built to accommodate only three families. McMahan, however, without recognizing the right to absorb his interest in line No. 6, made to the corporation some payments which he called contributions, and also offered another donation which the

plaintiff refused, and it caused the wire leading from his farmhouse to be cut, whereupon he connected the wire, thereby precipitating this suit, which resulted as hereinbefore stated.

1. The evidence conclusively shows that La Follette, Townsend and Beers constructed telephone line No. 6 as a joint venture, which undertaking constituted as between them a fiduciary relation analogous to a partnership, in which it must be presumed, in the absence of any evidence to the contrary, each had an equal interest: *Gius v. Coffinberry*, 39 Or. 414 (65 Pac. 358); *Eilers Music House v. Reine*, 65 Or. 598 (133 Pac. 788); *Campbell's Gas Burner Co. v. Hammer*, post, p. 612 (153 Pac. 475). When, therefore, Beers agreed in writing to sell his farm to the defendant, who pursuant to the express terms of the contract immediately took possession, the relation referred to was severed, and McMahan became the owner of an undivided one-third interest in telephone line No. 6. No assignment or transfer by La Follette or Townsend of their respective shares in that line appears to have been made either to the society or its successor the corporation. But, however this may be, it will be assumed, without attempting to decide a question which is not involved in this appeal, that their interests in telephone line No. 6 passed by estoppel to, and are now held and owned by, the plaintiff, and that, as a consideration therefor, La Follette and Townsend each received shares of the corporate stock.

2. We have no statute in this state permitting a corporation to enter into a partnership with a person, firm or other corporation, and, in the absence of an enactment on that subject, any agreement on the part of a corporation to enter into that relation must necessarily prove unavailing: 3 Thompson, Corp., § 2336.

A corporation, however, may under a joint venture with others transact any business that is within the scope of its legitimate powers, and thereby become liable on account of the fiduciary relation thus assumed: 3 Thompson, Corp., § 2337; 23 Cyc. 453; *Mestier v. Chevalier Paving Co.*, 108 La. 562 (32 South. 520). The relation referred to is usually created by express or implied agreement of the parties, but in the case at bar equity will look through the entire transaction, and, in order to promote justice, must take it for granted that a joint venture in maintaining and operating telephone line No. 6 was by operation of law created between the plaintiff and the defendant. The conclusion thus reached will make the fiduciary relation, existing by virtue of the joint venture, subject to dissolution, accounting and settlement in a court of equity in the same manner as all other cases of partnership.

3. The defendant is entitled to assert and hold an undivided one-third interest in and to telephone line No. 6, subject, however, to payment of his ratable share of the expense of operating a three-party line, to the same extent as that chargeable to and collected from La Follette and Townsend for their use of that line. This sum the defendant has ever been and now is ready and willing to pay.

It is impossible from the evidence before us to determine what compensation he should be required to make, in view of which the cause will be remanded, and, if an amicable adjustment cannot be reached, further evidence will be received, and based thereon a decree given for the reasonable sum so found to be due. The plaintiff will be enjoined from adding other patrons to the wire used in common by La Follette, Townsend and McMahan or their assigns. Nothing

here said is designed to prevent the plaintiff from putting up on line No. 6 more wires with which to supply the needs of other customers.

The cause will be remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

AFFIRMED AND REMANDED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE concur.

Argued December 6, affirmed December 28, 1915.

SCHUCKING v. YOUNG.*

(153 Pac. 803.)

Sales—Construction of Contract—When Character “#” Signifies “Pounds.”

1. In a contract reciting that the grower has sold and agreed to deliver to the plaintiff “25,000 # of 1913 hops at 14 cents per pound,” the hieroglyphic “#” when placed before a figure imports “number,” and when placed after a figure signifies “pounds.”

Sales—Breach of Contract—Buyers Offer to Perform.

2. By the terms of a contract for the sale of hops in which the seller agreed to deliver the hops on cars in Oregon, at the point selected by him, but before such delivery would be complete, plaintiff was required to inspect and receive them, upon written notice from plaintiff demanding that he be permitted to inspect and receive the hops, and at same time gave defendant notice that upon such inspection he would pay the full purchase price, such notice being wholly ignored by the defendant, amounted to a refusal to comply with the terms of such contract.

Contracts—Breach—Waiver of Tender of Performance or Ability to Perform Contract.

3. It is settled law that a declaration made by one of the contracting parties prior to the time fixed for the performance, that he will not comply with such contract, if not withdrawn, dispenses with any offer to perform by the other before bringing an action for breach of contract.

*On the right to abandon performance of contract and recover for breach of other party, see note in 30 L. R. A. 54. REPORTER.

Sales—Evidence of Ability of Buyer to Comply With Contract is Question for Jury.

4. Evidence in an action by a buyer for breach of a contract to sell and deliver certain hops examined, and *held* sufficient to authorize submitting to the jury the question whether plaintiff would have been able to have paid the contract price, if his offer to inspect and receive the hops had been accepted.

Pleading—Allegations in Complaint Admitted in Answer.

5. Where the complaint alleged full compliance with Laws of 1913, page 272, Section 5, relating to firm names, and defendant's answer admits such allegations to be true, such admission relieves plaintiff from proving the allegation admitted, the same being considered conclusive evidence of such facts. *Beamish v. Noon*, 76 Or. 415 (149 Pac. 522), followed.

Sales—Breach of Contract—Variance Between Pleadings and Proof.

6. In an action for breach of a contract to sell and deliver a certain number of pounds of hops, it was alleged in the first paragraph of the complaint that plaintiff was doing business in the name of a firm, and in the second paragraph that the contract was entered into with the firm, and as shown by the contract introduced in evidence the firm was the buyer, there is no such variance as could have misled defendant to his prejudice, within Section 97, L. O. L.

Appeal and Error—When Admission of Immaterial Evidence is Harmless.

7. In an action to recover damages for breach of a contract in which Y. agreed to sell and deliver "25,000 # of 1913 hops at 14 cents per pound," the admission of immaterial testimony as to the custom of hop buyers in the use of the hieroglyphic, #, was harmless.

Evidence—Documentary Evidence—Erasures and Alterations in Contract.

8. In an action for breach of a contract to sell and deliver hops, testimony of plaintiff *held* to show that all alterations and erasures appearing in the contract were made either before it was executed or by consent of the parties, and no error was committed in the admission of the document in evidence.

Evidence—Documentary Evidence—Effect of Testimony on Rebuttal.

9. On rebuttal, plaintiff having corrected his testimony in chief as to the time when the alterations and erasures appearing in the contract introduced by him in evidence were made, did not make the document inadmissible or the act admitting it erroneous.

From Marion: PERCY R. KELLY, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is an action by B. O. Schucking & Company against E. M. Young, for damages for breach of a contract to sell and deliver hops. The material portions of the complaint are as follows:

"I. That B. O. Schucking is now, and was at all the times hereinafter mentioned doing business under the name and style of B. O. Schucking & Co., and prior hereto has filed a certificate in the office of the county clerk of Marion County, Oregon, setting forth the name and style under which said business was to be conducted and the true name of the party conducting the same, together with his postoffice address, which certificate was duly executed and acknowledged by the plaintiff before an officer authorized to take acknowledgments of deeds.

"II. That on the 16th day of December, 1912, the plaintiff and the defendant entered into a contract whereby the said defendant promised and agreed to sell and deliver to said plaintiff 25,000 pounds of 1913 hops at and for the agreed price of 14 cents per pound, to be delivered f. o. b. cars Oregon, subject to inspection and acceptance, bales to be in good merchantable order, weighing from 185 to 205 pounds each, purchase made severable as to bales, and B. O. Schucking & Co. to inspect and receive hops from October 1 to November 15, 1913.

"III. That the reasonable market value of said hops from the 1st day of October, to and including the 15th day of November, 1913, was 23 cents per pound.

"IV. That plaintiff was continuously from the 30th day of September, 1913, until November 16, 1913, inclusive, ready, able, and willing to receive said hops at any time and place within the State of Oregon which the defendant might designate, and upon such receipt to pay the defendant the full amount of the purchase price therefor in accordance with said contract.

"V. That on the 4th day of November, 1913, the plaintiff requested the defendant to designate the time and place he would be ready to deliver to him the 25,000 pounds of hops mentioned in said contract, which the defendant failed and refused to do, or to indicate the time or place he would deliver to plaintiff the hops in accordance with said agreement, and failed and refused to permit the plaintiff to inspect, receive, accept, or pay for said hops. On the 13th day of

November, 1913, the plaintiff went to the residence and place of business of the defendant in Polk County, Oregon, between the hours of 10 A. M. and 4 P. M., for the purpose of inspecting, receiving, and paying the defendant the purchase price of said hops in accordance with the terms of said contract, and was at said time ready, able, and willing to receive, inspect, and pay for the same in accordance with said agreement, at which time the defendant failed to communicate with plaintiff or make his presence at said place known to the plaintiff, and failed and neglected to permit the plaintiff to inspect, receive, or pay for said hops in accordance with agreement. That thereafter on said 13th day of November, 1913, the said plaintiff served upon the defendant a writing, demanding that defendant permit plaintiff on the 15th of November, 1913, or at any time, to inspect and receive the hops mentioned and described in said contract, said inspection and receiving to be at any convenient place within the State of Oregon which defendant might designate, and that the defendant notify the plaintiff of the time and place where said inspection could be had and hops received. Plaintiff further notified defendant at said time that on said date, or upon the inspection and receipt of said hops, he would pay the defendant the full amount of the purchase price therefor, amounting to \$3,500. That defendant refused and neglected to comply with the terms of said notice or to make any objection to its contents, and failed and refused to notify the plaintiff of any time and place where said inspection could be had and hops received, and failed and refused to permit defendant to inspect, receive, or pay for said hops in accordance with said contract, on the 15th day of November, 1913, or at any time or place at which the plaintiff was ready, able, and willing to receive, inspect, and pay for said hops according to the terms of said contract.

“VI. That the defendant has failed, neglected, and refused to perform any of the conditions or terms of said contract, or to deliver to plaintiff said 25,000

pounds of hops, or any hops, as in said contract provided.

"VII. That by reason of the failure of the defendant to perform such agreement upon his part, as aforesaid, the plaintiff is damaged in the sum of \$2,250, which sum has not been paid, nor any part thereof."

The defendant answered, admitting all of paragraph I of the complaint, and interposed a general denial to the remainder. Upon the trial the plaintiff offered in evidence the following paper:

"Salem, Oreg., Dec. 16th, 1912.

"In consideration of one dollar, the receipt whereof is hereby acknowledged, I have this day sold to B. O. Schucking & Co. 25000 # ~~prime 1913 bales of my 1913 growth of hops like sample submitted~~ at 14 cents per pound (tare 5 lbs.), delivered f. o. b. cars Oregon, subject to inspection and acceptance. Bales to be in good merchantable order, weighing from 185 to 205 lbs. each. Purchase made severable as to bales and B. O. Schucking & Co. to inspect and receive hops, October 1st to November 15th, 1913.

"E. M. YOUNG.

"B. O. SCHUCKING."

Plaintiff testified that the symbol, #, was a symbol designating pounds when placed after figures, and was so understood at the time the contract was made. Among others, the following questions were asked and answered over defendant's objection:

"Q. You are familiar with the use of that symbol here among hop-growers, are you?"

"A. Amongst hop-growers?"

"Q. Amongst buyers.

"A. I am familiar with the usage of that symbol as designating 'pounds.'

"Q. Among the hop buyers?"

"A. Well, I don't know whether—they all use them at times, but it is an abbreviation for pounds and symbol used therefor."

Defendant called expert witnesses, who testified that the character, #, when used in commercial transactions, signified number. Some of them testified, however, that as used in the contract under consideration they would interpret it as signifying "pounds"; others that they would not be able to say what it denoted. The defendant admitted upon cross-examination it was the intent of the contract that it should call for the delivery by him of 25,000 pounds of hops. The plaintiff testified, in substance, that upon the eighth day of November, 1913, he met defendant in Salem, and asked him when he was going to deliver the hops under the contract, and that the defendant replied:

"I am not going to deliver. You don't think that contract of yours is any good?"

He stated that on November 13th he went to defendant's residence, and, not finding him at home, served upon him by leaving with his wife a notice demanding permission to inspect and receive the hops mentioned in the contract, said inspection to be at any convenient place within the State of Oregon which the defendant might designate, and upon such inspection and delivery plaintiff in said notice offered to pay defendant the full amount of the purchase price, namely, \$3,500. To this demand defendant made no response, and never at any time designated a time when or place where plaintiff might inspect or receive the hops, nor did he in any way evince a willingness to comply with his contract; and he was at all times between the first day of October and the fifteenth day of November, 1913, able, ready and willing to inspect, receive, accept and pay for the hops. Part of his testimony on this subject was as follows:

"Q. You may state to the jury whether you were able, ready and willing to accept and receive and in-

spect and pay for these hops between the first day of October, 1913, and the fifteenth day of November of the same year.

"A. Yes, sir.

"Q. Pardon me.

"A. Yes, sir.

"Q. Were you on the 15th of November, 1913, ready, able and willing to inspect, receive and pay for said hops?

"A. I was. * *

"Cross-examination.

"Q. Did you have that money?

"A. I had it, yes—arrangements made for it, so as to take—I was ready, willing and able to pay for those hops at any time between the 1st of October and the 15th of November.

"Q. Where was the money?

"A. Where was the money? I presume in the bank.

"Q. What bank?

"A. Why, wherever the party to whom—with whom I had made arrangements did his banking.

"Q. What I am getting at is this, where was the coin? Now, tell me, please.

"A. Well the coin—the coin was to come from Mr. T. A. Livesley. Now, where he had that coin I do not know.

"Q. Did you have any contract with Mr. Livesley?

"A. No; I didn't.

"Q. There was no binding bargain whatever, as I understand, between Livesley and you, whereby Livesley was absolutely bound to come and give you that money?

"A. I had agreed to sell and deliver to Mr. Livesley some hops, and he was to advance me whatever money I needed at any time during the 1st of October and the 15th of November.

"By Mr. Carson: Just read that question.

"(The reporter thereupon read the question to the witness as directed by counsel.)

"A. There was; I had an agreement with Mr. Livesley.

"Q. Where is that?

"A. It was a verbal agreement.

"Q. Did you turn over this contract to him?

"A. No, sir."

"Q. Just an understanding that you would get the money from him? * *

"Redirect examination.

"Q. You state, Mr. Schucking, whether or not you had credit with Ladd & Bush at that time to the extent that you could raise 14 cents a pound at that bank on these hops?

"A. Yes, sir.

"Q. How about the market generally? Would anyone have any trouble, you or anyone else, raising 14 cents a pound on these hops at that time?

"A. No, sir.

"Q. Or at any time between the 1st of October and 15th of November?

"A. No, sir."

T. A. Livesley testified, in substance, that Schucking had sold him 20,000 pounds of hops; that he had not contracted to furnish Schucking with the money to pay for the Young hops, but that he was ready to pay him for 20,000 pounds of hops when he was prepared to deliver them; that he understood that Schucking was selling to him, relying on the Young contract to make delivery of the 20,000 pounds contracted to witness. It appeared in the testimony that hops during this time were from 22 to 24 cents a pound, and plaintiff testified that it would have been easy to raise the money at any bank on the faith of his contract for purchase of 14 cents per pound. Other matters controverted upon the appeal will appear in the opinion. The plaintiff had a verdict and judgment and defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Oscar Hayter* and *Messrs. Carson & Brown*, with

oral arguments by *Mr. Hayter* and *Mr. John A. Carson*.

For respondent there was a brief over the name of *Messrs. McNary, Smith & Shields*, with oral arguments by *Mr. John H. McNary* and *Mr. Roy F. Shields*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. Plaintiff and defendant agree that the contract, so far as the hieroglyphic, #, is concerned, is in just the same condition as it was when it was executed, and that the intent of the writing was to evidence the sale by defendant and the purchase by plaintiff of 25,000 pounds of hops. The contract is declared upon according to its legal effect, and the hieroglyphic was simply the conventional method adopted by the parties to signify pounds. So far as they were concerned, it spelled "pounds," just as effectually as though the word had been written in full in capital letters. Nobody can read the agreement and construe it any other way, and any testimony upon the subject was useless, except in so far as it tended to show the interpretation put upon it by the parties themselves. Webster defines the character, #, as signifying number. Taking this definition, we find that the unit of price is 14 cents, the unit of goods to which that price applies is a pound of hops, and the number of such units is 25,000. It is so plain that the wayfaring man, though a judge or a jurymen, need not err therein. A reference to standard works on bookkeeping indicates that this hieroglyphic when placed before a figure imports "number," and when placed after a figure invariably signifies "pounds." Thus on page 121 of Sadler and

Rowe's "Business Bookkeeping and Practice," we find many entries like the following:

"Wm. E. Brady, #94 Harlem Av. 20# G. sugar at 5c.; 5# Butter at 30c.; 8# C. sugar at 5c.," etc.

The symbol is the accepted and business-like substitute for the word "pounds" when written in the above connection and following a numeral.

2. Another objection goes to the evidence of plaintiff's ability and readiness to perform and to the sufficiency of his offer to do so. The first duty of the seller was to deliver the hops at some point on cars in Oregon, he having the option as to the place of delivery, but before such delivery would be complete, plaintiff was required to inspect and receive them. Until so inspected and received, defendant was entitled to the possession of them, and when they had been inspected, received and delivered, plaintiff was bound to pay for them. The delivery and payment were to be concurrent acts, but the inspection and approval were to precede delivery and payment. Plaintiff had a right to inspect, and as the hops were in defendant's custody and no time or place was designated for the inspection, it became defendant's duty, upon demand of plaintiff, to permit such inspection and to designate a time and place where such inspection could be made. This plaintiff's evidence, which is conclusive upon this court after verdict, shows was refused by defendant, and thereby the contract was broken. It is shown that plaintiff made a written demand on defendant that he be permitted to inspect and receive the hops mentioned in the contract, such inspection and receiving to be at any convenient place which defendant might designate, and that defendant notify plaintiff of the time and place where such inspection could be had and the hops received; and in the same communication

he notified defendant that upon such inspection he would pay him the full purchase price of the hops, amounting to \$3,500. Defendant wholly ignored this demand, and this, under the circumstances, amounted to a refusal.

3. It further appears from plaintiff's testimony that upon the 8th of November, 1913, plaintiff said to defendant: "Eph, it is getting pretty late. Can you tell me when you are going to be ready to deliver so that I will be there?" and that defendant answered: "I am not going to deliver. You don't think that contract of yours is any good?"—to which plaintiff replied, "I most certainly do." Whereupon defendant answered, "Well it is not." Accepting this testimony as true, as we must after verdict, plaintiff has shown a compliance with every condition of his contract so far as defendant's conduct has permitted him to do so, and has disclosed a good right to recover unless he has failed to show his ability to have paid for the hops had defendant complied with his part of the contract; it being the settled law of this state that a declaration by one party to a contract made prior to the time fixed for the performance that he will not comply with such contract, if not withdrawn, may dispense with or excuse an offer to perform by the other party before bringing the action, although it does not ordinarily excuse ability to perform: *Longfellow v. Huffman*, 49 Or. 486 (90 Pac. 907); *Krebs Hop Co. v. Livesley*, 55 Or. 227 (104 Pac. 3).

4. This brings us to the question whether there was evidence sufficient to go to the jury tending to show that plaintiff if his offer to inspect and receive the hops had been accepted, would have been able to pay the \$3,500 required by his contract. The testimony indicates that he did not, at the time of the demand

upon defendant, have that amount of money in the bank or in his possession, but it also appears that if defendant had accepted his offer Mr. Livesley had agreed to take 20,000 pounds of the hops and to advance the money to pay for them, which would have been sufficient to have enabled plaintiff to pay defendant. It is also in evidence that hops were then bringing from 22 to 24 cents a pound, and that plaintiff could easily have raised the money upon a contract which called for a payment at the rate of only 14 cents a pound. The question of his ability to have paid the purchase price was one of fact for the jury, and we think upon the whole testimony there is no doubt that, if the defendant had been willing to comply with his part of the agreement, his money would have been ready. That this is sufficient is, we think, shown by *Ladd & Tilton v. Mason*, 10 Or. 308; *Catlin v. Jones*, 52 Or. 337 (97 Pac. 546); *James Higgins Co. v. Torvick*, 55 Or. 274 (106 Pac. 22).

5. We will now consider *seriatim* the points urged in defendant's brief. The first point relates to the failure of plaintiff to prove compliance with Chapter 154, Laws of 1913, relating to firm names, etc. The complaint alleged full compliance with the act, and this allegation was expressly admitted in the answer. Notwithstanding this admission, defendant now insists that under the provisions of Section 5 of the act referred to plaintiff should have introduced evidence to sustain the allegation; said section being as follows:

"No person or persons carrying on, conducting or transacting business as aforesaid, or having any interest therein, shall hereafter be entitled to maintain any suit or action in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided for in Section 1, and fail-

ure to file such certificate shall be *prima facie* evidence of fraud in securing credit."

We do not think that it was the intention of the legislature to alter the rules of evidence to such an extent as to require a party to introduce evidence of a fact already admitted by his adversary. While admissions in the pleadings are generally spoken of as dispensing with evidence of the facts so admitted, they are really conclusive evidence of such facts: 1 R. C. L. 469. In *Beamish v. Noon*, 76 Or. 415 (149 Pac. 522), we held that the objection that the complaint failed to allege that the certificate required by the act had been filed was waived by a failure to demur or plead in abatement, and that decision is conclusive here.

Points 2, 3, 4, 6, 8 and 9 are already covered by our preceding discussion and need not be further considered.

6. By point 5 it is urged the agreement introduced by plaintiff is void for uncertainty and repugnance and does not prove the allegation of B. O. Schucking as buyer against E. M. Young as seller. By admitting the first paragraph, it is conceded by defendant that plaintiff was doing business as Schucking & Co., in effect that Schucking & Co. was in fact B. O. Schucking. It is alleged in paragraph 2 that the contract was entered into with B. O. Schucking & Co., which taken in connection with the first allegation is substantially an allegation that it was entered into with plaintiff. There is no such variance between the pleadings and proof as could possibly have misled defendant to his prejudice, and this is what a variance must do to enable a party to take advantage of it: Section 97, L. O. L.

7. Point 6 relates to alterations in the written agreement. It is claimed that the alterations and erasures

were not explained before the agreement was received in evidence. This is evidently a mistake. Upon page 3 of the transcript of evidence we find, after plaintiff had testified respecting the making and signing of the document, his attention was called to the interlineations and erasures, whereupon he testified that they were made before the agreement was signed. Counsel then proceeded to interrogate him as to the meaning of the sign, #, following the figures, "25,000," when counsel for defendant interposed an objection to this line of examination, which after argument was overruled by the court. Thereafter the examination was continued in reference to the custom of hop buyers in the use of this hieroglyphic (which testimony we hold was immaterial, but harmless), and counsel for plaintiff offered the agreement in evidence.

8. Before it was admitted counsel for defendant obtained leave to cross-examine further, and handed plaintiff a duplicate in which the interlineations did not appear. Plaintiff then testified, in substance, that the two were written at the same time and with the same impression of the pencil, there being a carbon paper between the sheets of paper, and that both were signed at once, the pencil making an impression on the second sheet. In answer to an interrogatory by his counsel he then made the following explanation:

"A. I stated—when you asked me, I said that all those interlineations and erasures had been made before the contract had been signed. That was true, with one exception. You will notice in the duplicate copy the word 'prime' shows. After it was written and signed Mr. Young objected to the word 'prime.' He said he wouldn't specify or hold himself to any one particular quality, but he would deliver a merchantable hop, good average hop, and so, thinking Mr. Young couldn't attempt to deliver anything but what was a merchantable hop—

"By Mr. Carson: Just a minute—

"By Mr. McNary: Just tell what happened.

"A. So, at his suggestion and his desire I crossed out the word 'prime' on mine. This was after the contract had been signed.

"Q. Was that the only change?

"A. That was the only change; yes, sir."

This testimony was technically sufficient to justify the admission of the document.

9. It is true that after it had been admitted and during his examination on rebuttal he made a correction by stating that the figures, "1913," following the erasure of the word "prime" were written at the same time that the word "prime" was erased, but this correction does not alter the fact that when the document was admitted there was before the court evidence to justify the ruling admitting it. The testimony given upon rebuttal would have had the same effect had it been given upon the direct case, so that its introduction did not alter the status of the document in any respect.

Tested by the views above expressed we are of opinion that there was a fair trial in the court below, that the instructions given fully and fairly stated the law, and that the record discloses no reversible error.

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and
MR. JUSTICE HARRIS CONCUR.

Argued December 13, affirmed December 28, 1915.

RIDDLE STATE BANK v. LINK.

(153 Pac. 1192.)

Evidence—Parol Evidence Admitted to Explain Transaction not to Contradict Writing.

1. Parol evidence is properly admitted where it tends to establish that a certain contract executed by one L. was in fact the contract of two other defendants, R. and D., the object of such parol evidence being to explain the whole transaction, rather than to contradict the contract.

Evidence—Documentary Evidence—Intention Explained by Parol.

2. Where a written contract has been introduced in evidence, and it appearing that same was executed by R. and L. as an agreement for and on behalf of R. as one party and L. W. and H. as the other, it was not error to show by parol that the contract was in fact not only the act of L., but that of W. and H. as well.

[As to parol evidence to explain meaning of words as used in written contract, see note in 122 Am. St. Rep. 546.]

Contracts—Right to Enforce Although in Form a Conditional Sale.

3. Where purchasers had assumed payment of the note sued on, as a part of the purchase price of a sawmill and standing timber, bought from the payer of the note under an agreement of conditional sale that was taken in the name of L. only, as a matter of convenience, and where the possession had not been given by the seller, such fact did not release W. and H. from liability on the note, where it was shown that all three buyers were jointly interested in the purchase of the property.

Appeal and Error—Effect of Evidence is Question for the Jury.

4. Competent evidence, its credibility and effect, is a question for the jury to determine.

Frauds, Statute of—Parol Evidence of Contract to Pay for Property in Particular Way.

5. Where evidence established the fact that one defendant had contracted in writing for the purchase of certain property from the maker of the note sued on and as a part of the purchase price assumed payment of said note, the statute of frauds did not prevent the introduction of parol evidence to show that he acted for himself and two others jointly in the transaction; the agreement whereby he assumed such payment being a contract to pay for the property in a particular way, and not a contract to answer for and pay the debt of another.

From Douglas: JAMES W. HAMILTON, Judge.

Department 2. Statement by MR. JUSTICE BENSON.

This is an action by the Riddle State Bank, a corporation, against J. A. Link, Wilbert J. Ross, A. Ellen

Dunbar, Brice Wilson and R. E. Hutchinson, to obtain judgment upon a promissory note.

The complaint alleges in substance that on November 16, 1910, plaintiff, at the special instance and request of defendants Ross and Dunbar, loaned \$2,200 to Ross, for which these defendants then made, executed and delivered to plaintiff their promissory note which is set out in full. That thereafter the defendants Link, Wilson and Hutchinson acting together, and with the intention of organizing a corporation to be known as the Alder Creek Lumber Company, purchased a certain sawmill, and other property to be used in connection therewith, from Ross, agreeing to pay therefor the sum of \$5,500; that as a matter of convenience to the purchasers the written agreement for the purchase from Ross was made in the name of Link only, but was, in fact, the agreement of all three with the intent that the property should be by him transferred to the corporation as soon as it should be organized; that such corporation was never organized, but that Link, Wilson and Hutchinson thereafter operated the mill under the name of Alder Creek Lumber Company as copartners; that according to the agreement of purchase they were to pay the price as follows: One thousand dollars in cash on or before August 8, 1912; \$2,300 to be paid monthly in cash as certain timber should be sawed and cut; that any portion of the \$2,300 remaining unpaid after July 18, 1912, should bear interest at the rate of 8 per cent; that they agreed to pay the remainder of the purchase price by assuming and paying to plaintiff the note above referred to, entirely relieving defendant Ross thereof, on or before November 16, 1913; that thereafter at the special instance and request of Link, Wilson and Hutchinson plaintiff extended the time of payment of the note

from November 16, 1911, to November 16, 1912; and that Wilson and Hutchinson especially promised and agreed to pay the same at such later date according to the terms thereof; that the defendants last named made a payment of interest amounting to \$110 for the half year ending November 16, 1912.

The defendants Wilson and Hutchinson answered separately, denying the allegations of the complaint. The other defendants made default. A trial was had resulting in a verdict and judgment for plaintiff, from which the answering defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Clark, Skulason & Clark*, with an oral argument by *Mr. B. J. Skulason*.

For respondent there was a brief with oral arguments by *Mr. Oliver P. Coshow* and *Mr. A. N. Orcutt*.

MR. JUSTICE BENSON delivered the opinion of the court.

The first three assignments of error are so intimately connected that we shall consider them together. They are to the effect that the court erred in admitting parol evidence of the alleged promise of defendants to pay the note, since it was a promise to answer for the debt of another and therefore in violation of the statute of frauds; that the court erred in admitting in evidence the written agreement of purchase and sale between Ross and Link as the agreement of Wilson and Hutchinson because it was an attempt to vary by parol the terms of a written instrument; that the court erred in denying defendants' motion for a nonsuit upon the ground that there was no competent evidence to show

any agreement upon their part to pay the debt of Ross and Dunbar; that the evidence disclosed affirmatively that the title of property never passed to Wilson and Hutchinson; that there was no evidence to show that Link had any authority to bind them in the manner of assuming payment of the note at the bank; and that there was no evidence of any partnership existing between Link and the answering defendants.

1. The parol evidence tending to show that the written contract executed by Link was in fact the contract of all three, was properly admitted. In the case of *Flegel v. Dowling*, 54 Or. 40 (135 Am. St. Rep. 812, 19 Ann. Cas. 1159, 102 Pac. 178), it was held that the statute of frauds does not exclude parol evidence to show that a written contract made between A, the seller, and B, the buyer, was on B's part made by him only as agent for C. It is said that such evidence does not contradict the writing, but explains the transaction.

2. As to the admissibility of the written contract signed by Ross and Link, it is enough to say that if the parol testimony above referred to satisfied the jury that the contract was, in fact, the act of Hutchinson and Wilson, then it was properly admitted.

3. We come next to a consideration of the written document itself. It is a contract for the purchase of the sawmill property and certain standing timber, and is, in form, written evidence of a conditional sale. Under such an agreement the delivery of possession by the seller was all that remained for him to do until such time as the final installment of the purchase price should be paid, at which time he would be required to deliver written evidence of title in the purchaser, and nothing remained for the buyer to perform other than the payment of the purchase price. There is therefore

no merit in the contention that there was no evidence of a purchase. It is immaterial as to whether there was evidence of a partnership in the strict sense of the term for there is evidence tending to show that Link, Hutchinson and Wilson were jointly interested in the purchase.

4. The credibility and effect of such evidence was for the jury to determine.

If the promise by Hutchinson and Wilson to pay the note was, as alleged in the complaint, a part of the purchase price, it would be susceptible of proof by parol evidence. As is said in *Feldman v. McGuire*, 34 Or. 309 (55 Pac. 872):

“It was not a mere promise by the defendant to be responsible for the debts of Corlett to those parties, and to pay those debts, but a promise by him to pay his own debt in that particular way.”

The instruction of which complaint is made does not undertake to determine any question of fact, but is a proper statement of the law to the effect that taking possession of the personal property under a written contract, like the one in evidence, is sufficient to make the transaction a sale. Finding no error in the record, the judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and
MR. JUSTICE HARRIS CONCUR.

Argued November 29, affirmed December 28, 1915.

EVANHOFF v. STATE INDUSTRIAL ACCIDENT COMMISSION.*

(154 Pac. 106.)

Injunction—Not the Proper Remedy to Test the Workmen's Compensation Act.

1. The benefits to be derived under the Workmen's Compensation Act (Laws 1913, p. 188) will not be enjoined at the instance of an injured employee, on the ground that the State Industrial Accident Commission and the State Treasurer are depriving him of the right of a trial by jury, and are unlawfully attempting to dictate and determine the amount he shall recover, for the reason he could test the unconstitutionality of the act and the authority of the commission, by ignoring them and bringing his action either at common law or under the Employers' Liability Act.

[As to constitutionality of Workmen's Compensation Act, see note in *Ann. Cas.* 1912B, 174.

Injunction—Burden of Taxpayer by Payment of Salaries to Commission as Grounds.

2. Plaintiff has shown but one reason why he should be allowed to bring this suit, and that is because he is a taxpayer; that by the unlawful expenditure of the money appropriated under the provisions of the act, his financial burdens might be increased.

Master and Servant—Title of the Workmen's Compensation Act is Constitutional.

3. The title to the Workmen's Compensation Act (Laws 1913, p. 188) is as follows: "An act creating the State Industrial Accident Commission and providing an Industrial Accident Fund, making an appropriation for such fund and providing for the administration of the terms of the act, providing for the collection and disbursement of funds for the benefit, compensation and care of workmen, prescribing the duties of employers and workmen subject to this act, and providing penalties for the violation of the terms of this act, and abolishing in certain cases the defenses of assumption of risk, contributory negligence and the negligence of a fellow-servant in actions for personal injury and death," does not violate that part of the state Constitution requiring every act to embrace but one subject, which shall be expressed in the title.

Constitutional Law—Act Creating State Industrial Accident Commission is Constitutional.

4. The act creating the State Industrial Accident Commission (Laws 1913, p. 188) is not in contravention of Article III, Section 1

*On the constitutionality of statute rendering the master liable for injury to servant irrespective of negligence, see note in 34 *L. E. A.* (N. S.) 162.

The constitutionality, application and effect of the Federal Employers' Liability Act is discussed in notes in 47 *L. E. A.* (N. S.) 38; *L. E. A.* 1915C, 47.

of the state Constitution that provides as follows: "The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another." *In re Willow Creek*, 74 Or. 592, 610, 611 (144 Pac. 505), approved and followed.

Constitutional Law—Judicial Powers Conferred by Constitutional Provision.

5. By force of the amendment to Article VII, Section 1, of the Constitution (Laws 1811, p. 7), the legislature was empowered and authorized to confer judicial powers upon the State Industrial Accident Commission under the workmen's compensation law, for the reason under this amendment either the legislature or the people have the right to confer judicial powers upon any tribunal it or they may select, *provided*, the executive, legislative and judicial departments of the state government are not blended so as to contravene Article III, Section 1 of the Constitution.

Constitutional Law—Right to Trial by Jury—Due Process of Law.

6. The Workmen's Compensation Act (Laws 1913, p. 188), establishing a system of voluntary accident insurance and creating the State Industrial Accident Commission to carry into effect its provisions, does not violate either Article I, Section 10, of the state Constitution, providing "No court shall be secret, but justice shall be administered openly * * and without delay, and every man shall have remedy by due process of law for injury done him in his person, property or reputation," or Section 1 of the Fourteenth Amendment to the United States Constitution, declaring " * * nor shall any state deprive any person of life, liberty or property, without due process of law, * * " for the reason that the act does not attempt to establish a court to try causes without a jury, neither does it compel employers and employees to adjust their grievances without their consent, for the act allows the employer an election to either accept or reject its provisions, and in case he rejects the act, he is left the right to protect himself from personal injury actions in the courts.

Master and Servant—Constitutionality of the Workmen's Compensation Act.

7. The act under consideration (Laws 1913, p. 188) is not unconstitutional, because it requires the employee to elect at the time of his employment and prior to any injury whether or not he will come under the terms of the act, and further providing that in case he chooses to come under the terms of the act, he thereby waives the right to resort to the courts for redress, since the act proposes to both employers and employees a scheme for obtaining life and accident insurance in lieu of litigation, but is not compulsory on either, and this feature eliminates the objection that the act is unconstitutional.

Statutes—Construction When Followed and Acquiesced in by the Legislature.

8. The act creating the State Industrial Accident Commission, appointing three commissioners at a salary of \$3,600 per annum, payable from a fund provided for by the act, is not in violation of Article IX, Section 7, of the Constitution, for the reason that the act is not an

appropriation bill in the sense that bills providing for general current expenses or salaries of the constitutional officers of the state are such. From the year 1860 to the present time, similar laws to the instant act have been passed and a uniform construction of this section of the Constitution in other states having identical or similar provisions in their constitutions, is that it will not prevent the legislature from passing an act for a particular purpose, and in the same act to provide and appropriate the necessary funds to carry the object of the act into effect.

Constitutional Law—Construction as to Constitutionality of Statute.

9. The rule is well settled in this state that a statute will not be held unconstitutional where a reasonable doubt exists as to its invalidity. (Citing *In re Willow Creek*, 74 Or. 592 (144 Pac. 505), and other Oregon cases.)

Statutes—Constitutional Provisions as to Reading Legislative Bills.

10. Under Article IV, Section 19, of the Constitution, requiring all bills to be read by sections on three several days in both the House and Senate, does not require the whole bill, as amended during its progress through the legislature, to be so read, and such has never been the practice in this state.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE MCBRIDE.

This is a suit in equity by George Evanhoff against the State Industrial Accident Commission to enjoin the enforcement of Chapter 112, Laws of 1913, generally known as the Workmen's Compensation Act. In the complaint it is alleged that plaintiff is a subject of the king of Bulgaria, but is a resident freeholder and taxpayer of the State of Oregon. The complaint then alleges that he has a good cause of action against the Bridal Veil Lumber Company for damages for personal injuries sustained by him while in its employ, and sets forth in detail the facts constituting such cause of action with all the particularity which could be required in an action for damages against said corporation, averring that he has thereby been damaged in the sum of \$15,000. It is further alleged:

“The State Industrial Accident Commission wrongfully professes to have power and authority to deprive plaintiff of his right of action or to a civil trial

in the said cause, and wrongfully professes to have power and authority, and is threatening to and will, unless restrained by this court, deprive this plaintiff of his right of trial of said cause of action before a jury or before any of the established Circuit Courts of the State of Oregon, more especially before the Circuit Court of the State of Oregon otherwise having jurisdiction thereof, and wrongfully professes to have power and authority to determine the amount which plaintiff shall receive in payment by reason of said injuries, and to cause plaintiff to accept from said State Industrial Accident Commission a sum which it may see fit to award plaintiff in full and complete discharge and satisfaction of all of his claims arising from the matters herein alleged, and that the said State Industrial Accident Commission bases its claim upon and in virtue of an act, to wit, House Bill No. 27, entitled, 'An act creating the State Industrial Accident Commission and providing an industrial accident fund, making an appropriation for such fund and providing for the administration of the terms of this act, providing for the collection and disbursement of funds for the benefit, compensation and care of workmen, prescribing the duties of employers and workmen subject to this act, and providing penalties for a violation of the terms of this act, and abolishing in certain cases the defenses of assumption of risk, contributory negligence and the negligence of a fellow-servant in actions for personal injury and death,' filed in the office of the Secretary of State of the State of Oregon, February 25, 1913, and acts amendatory thereto and thereof. * * Thos. B. Kay, as State Treasurer of the State of Oregon, wrongfully and without right professes and claims to be empowered by the said act to pay, and unless restrained by an order of this court will pay, to each of the said commissioners constituting the State Industrial Accident Commission the sum of \$3,600 a year each as salary for their acts as such, and will make such payments out of a fund purported to be created by and referred to in said act; and, further, the said State Treasurer

claims and asserts power and authority to pay, and unless restrained by order of this court will pay, out of such funds divers sums of money for all and every of the various purposes set forth in said act, and wrongfully and without right asserts power and authority to pay, and unless restrained by order of this court, will pay, out of said fund such sums of money as the commission above named may see fit to allow to various and numerous injured workmen, and by such payment the said State Treasurer will divert large sums of money collected as taxes to the payment of the various sums designated in said act. * *

“The acts of the defendants State Industrial Accident Commission and Thos. B. Kay, State Treasurer of the State of Oregon, in enforcing the said legislative enactment known as and called the Workmen’s Compensation Act of Oregon, are, and each of them is, wrongful and unlawful in this: That the said act (Sess. Laws Or. 1913, p. 188), filed in the office of the Secretary of State, February 25, 1913, commonly known as and called the Oregon Workmen’s Compensation Act, is unconstitutional and void and conflicts with the provisions of the Constitution of the State of Oregon, as well as the Constitution of the United States in the following particulars, to wit: (1) It vests judicial powers and functions in an administrative and executive board, to wit, the Oregon Industrial Accident Commission, and thereby attempts to combine judicial and executive functions in violation of Section 1, Article III, of the Constitution of Oregon. (2) It arbitrarily fixes a limit on sums to be allowed for personal injuries, and thereby passes judgment by legislative enactment on the amount which any injured person falling within its purview may recover, and is violative of Section 1, Article III, of the Constitution of Oregon in that the legislature, by fixing such judgments, attempts to and did exercise judicial powers. (3) It is not within the police powers of the state. (4) It provides a system of awards based upon sociological reasons, and disregards the individual and personal right of an injured employee to recover for

such injuries, and thereby violates Section 10, Article I, and Section 17, Article I, of the Oregon Constitution. (5) It imposes taxes which are general throughout the state. Such act has not been ratified by the voters of the state at a general election, as provided in Section 1a, Article IX, of the Constitution of Oregon as amended by Laws of 1911, at page 9, and therefore is not in force. (6) It violates subdivision 3, Section 23, Article IV, in this: Section 32 of the said act attempts to provide and regulate a special practice in courts of justice. It further violates subdivision 10 of Section 23, Article IV, of the Constitution of the State of Oregon, in that it purports to and provides for the assessment and collection of taxes for state purposes, and is a special act on both the subjects herein specified. (7) It violates the Constitution of Oregon at Section 7 of Article IX, in this: It creates public offices and makes appropriations for the salaries of the officers therein designated and other current expenses of the state, and embraces subjects other than those relating to the salaries of such officers and the current expenses of the state. In addition to such subjects, it purports to and does embrace acts on the following subjects: (a) Creating the State Industrial Accident Commission; (b) providing an industrial accident fund; (c) making an appropriation for such fund; (d) providing for the administration of the terms of the act; (e) providing for the collection and disbursement of funds for the benefit, compensation and care of workmen; (f) prescribes the duties of employers and workmen subject to the act; (g) provides penalties for violations of the terms of the act; (h) abolishes certain defenses in certain cases; (i) attempts to regulate rights where injuries to a laboring man are caused by third persons; (j) provides a system of appeals and regulates practice thereon. (8) It vests judicial power in the State Industrial Accident Commission without providing for a jury trial before it, and attempts to make its decisions binding unless appealed from, and thereby deprives injured laborers of their right of jury trial in civil cases, and is viola-

tive of Section 17, Article I, Section 1a, Article I, and Section 10, Article III, of the Constitution of Oregon. (9) It provides for the determination of questions involving the extent of injuries and the amount to be recovered by injured workmen, and vests the determination of such questions in the said Oregon Industrial Accident Commission, and does not require notice to be given to the injured workmen of the time or place of hearing, nor require process to procure the attendance of witnesses, nor does it require that a time and opportunity be given to such injured workmen to be heard in respect to their rights, and therein it does not provide due process of law to persons falling within its purview, and is violative of Section 10, Article I, of the Constitution of the State of Oregon. (10) It attempts to compel workmen to make an election in advance of injuries received between the awards under the act and the constitutional right to proceed in a civil jury case guaranteed by Section 10, Article I, and Section 17, Article I, of the Constitution of Oregon. (11) At Sections 2 and 3 of the Workmen's Compensation Act, it provides for the appointment and removal of commissioners. It does not provide for their election and recall, and the said act vests judicial power in said commissioners and is violative of Section 18, Article II, of the Constitution of Oregon. (12) At Section 20 of said act it attempts to make annual appropriations out of any moneys in the state treasury not otherwise appropriated, and makes such appropriations for a period of time extending beyond the life of the legislative assembly which passed the act, and thereby violates Sections 1, 2 and 3, Article IX, of the Constitution of Oregon. (13) It violates Sections 7, 8 and 9, Article XI, of the Constitution of Oregon in this: That at Section 20 of the said act an appropriation is made out of any moneys in the general fund in the state treasury not otherwise appropriated, and there is also appropriated annually out of any moneys in the state treasury not otherwise appropriated a sum equal to one seventh of the total sum, which shall be received by the State

Treasurer under provisions of Section 19 of said act, and by such enactments the State of Oregon undertakes to and does assume to pay obligations and losses occasioned in the private business of persons, corporations and associations, and the state attempts to and does lend its credit to such private enterprises and corporations. (14) That the said act is violative of Section 20, Article IV, of the Constitution of Oregon in this: It embraces subjects not expressed in the title and not germane thereto. At Section 12 it attempts to regulate rights of an injured workman injured by a third person, and at the same section it purports to provide an exclusive remedy in lieu of all claims against an employer, and thereby prohibits one spouse from recovering for loss of consortium by injury to the other caused through the fault of the master. (15) That the said act is discriminatory as between laborers affected by its provisions in this: That it does not relate to laborers for the state, any counties or any municipalities within the state, who may be engaged in similar employments, as laborers working for private corporations, and it thereby denies to laborers for private persons, corporations, associations and enterprises the equal protection of the law, which laborers for the state, or any of the counties within the state, or any municipalities within the state, are guaranteed and retained.

“The said act is violative of the Constitution of the United States, and of the State of Oregon in the following particulars: (1) It violates Section 4, Article IV, of the Constitution of the United States in this: That it deprives injured workingmen within its purview of a republican form of government by vesting judicial and executive powers in the same officers. (2) It is violative of Amendment 7 and Amendment 14, Section 1, of the Constitution of the United States, and of Section 10, Article I, and Section 17, Article I, of the Constitution of Oregon, in that it deprives a workman, injured through the fault of his master, of the right to trial by jury, and also deprives such workman of the right to recover individually for the

individual wrongs committed against him, and denies the right to recover a sum commensurate with the injuries sustained. (3) It deprives injured workmen of property without process of law in violation of Amendment 14, Section 1, of the Constitution of the United States in this: It does not require a trial before the Oregon Industrial Accident Commission, nor does it require notice of the time or place of hearing to be given to such workmen, nor afford them an opportunity to appear before such board in person or by counsel, nor does it require the protection of witnesses before such board for or against the claim of such injured workmen, but it provides for a summary procedure in determining the extent and character of injuries suffered by such workmen, as well as determining the amount to be recovered within the limits prescribed, and limits the amount of recovery to sums not purporting to be commensurate with the injuries sustained. (4) It denies to injured workmen the equal protection of the law, and violates Amendment 14, Section 1, of the Constitution of the United States in this: That within the class of workmen affected by its provisions, it awards equal sums for similar injuries to different workmen, regardless of the question of fault, and thereby takes from a workman injured through the fault of his master the sum which he should recover, and gives to a workman suffering like injuries an equal sum, although he is hurt through his own fault; also it denies the equal protection of the laws to workmen of the same class, grade and kind who are working for private persons, corporations, firms or enterprises, and takes from them the privileges of jury trial and immunity from the operation of said law which are accorded to laborers for the State of Oregon, or any of the several counties within the State of Oregon, or any municipalities within the State of Oregon, in this: That laborers engaged in like work for the State of Oregon, or any municipality or county therein, as that in which laborers for private corporations, associations, individuals or enterprises are engaged, are not embraced within its

terms; that in each particular specified herein wherein the said act violates the Constitution of the United States, it infringes upon the right of this plaintiff to recover for the injuries hereinbefore set forth."

The plaintiff declares that the act under which defendants claim authority was not properly passed, and several pages of the journals of the two houses of the legislature are pleaded, but are here omitted, the substance of the alleged informalities being that the original bill as introduced was amended in both houses in several particulars, and that the complete bill as finally amended was not read three times, as required by Section 19, Article IV, of the Constitution. There was a general demurrer to the complaint, which being sustained, the plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Messrs. Logan & Smith*, with an oral argument by *Mr. Isham N. Smith*.

For respondents there was a brief with oral arguments by *Mr. George M. Brown*, Attorney General, and *Mr. J. O. Bailey*, Assistant Attorney General.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. The complaint and the able and ingenious brief of counsel for plaintiff point out 19 alleged specific violations of the Constitution of this state, all committed within the compass of a single act, and then, piling Pelion on Ossa, specifies four alleged violations of the Constitution of the United States, perpetrated by means of the same statute. It would be, indeed, a reflection upon republican government if a bill which is so permeated with the rottenness of unconstitu-

tionality could pass both houses of the legislature with only three dissenting votes, and thereafter be indorsed by the people upon a referendum by a majority of more than two to one. It may be premised that, assuming every allegation as to the unconstitutionality of the act is well taken, plaintiff has shown but one reason why he should be permitted to bring this suit, and that is because he is a taxpayer of the state, and that by the unlawful expenditure of the moneys appropriated by the state under the provisions of the act in question his financial burdens as such will be increased: *State ex rel. v. Metschan*, 32 Or. 372 (46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692).

The allegations that the defendants threatened to deprive plaintiff of the right of trial by jury and wrongfully claim to have power to determine the amount that plaintiff shall recover, etc., have no force whatever. If plaintiff has a right to sue in the courts, there is manifestly no method whereby the defendants can prevent his so doing. If they have no right to determine his case for any reason, there is no law which compels him to present his claim to them or to abide their award if made against his remonstrance. He can test their authority by ignoring them and bringing his action either at common law or under the Employers' Liability Act as the fact may warrant. The sufficiency of the facts in relation to the injury to permit a recovery under either aspect, not being relevant to the matter in controversy, will not here be discussed.

3. Under the first point made in the brief are included several objections to the title of the act, which is as follows:

“An act creating the State Industrial Accident Commission and providing an Industrial Accident Fund, making an appropriation for such fund and providing for the administration of the terms of this act, providing for the collection and disbursement of funds for the benefit, compensation and care of workmen, prescribing the duties of employers and workmen subject to this act, and providing penalties for a violation of the terms of this act, and abolishing in certain cases the defenses of assumption of risk, contributory negligence and the negligence of a fellow-servant in actions for personal injury and death.”

Concerning this objection counsel in their brief observe:

“It is plain that the act provides a system of jurisprudence for the administration of all questions relative to injuries received by workmen in the course of their employment, save those specified in the act itself. It also creates a board; a fund, and makes appropriations therefrom; provides: (a) For its administration; (b) the collection and disbursement of its funds; (c) the duties of employers and employees; (d) penalties for its violation; and (e) abolishes certain defenses in such cases.”

In our view every matter referred to in the title is germane to the purpose of the act. Its object is to provide a system of actual voluntary insurance for injured workmen. As a necessary part of the system, a fund is to be raised whereof the employer shall contribute the larger part, the employee a small part, and the state a small portion. It would be absurd and wholly outside the intent of the Constitution to require that there should be one act to create the Commission and define its duties, another to prescribe the amount the employee should contribute, a third to fix the amount that the state should contribute,

and a fourth to appropriate the money thus defined to be the state's contribution. Such red-tape methods of accomplishing an object justified by the highest considerations of public policy and humanity were never contemplated by the framers of the Constitution.

"It is sufficient if the general subject of the act is contained in the title and is a fair index to the legislation proposed, and if all the provisions of the act are germane to such subject and do not relate to matters wholly foreign thereto": *In re Willow Creek*, 74 Or. 592, 615 (144 Pac. 505).

4. It is also urged in the objection now being considered, and elsewhere in the able brief of plaintiff, that the act in question attempts to confer judicial and legislative functions upon the Industrial Accident Commission, and is therefore in contravention of Section 1, Article III, of the Constitution, which is as follows:

"The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

This identical question is passed upon adversely to plaintiff's contention in *Re Willow Creek*, at pages 610, 611, of 74 Or., and that opinion and the authorities there cited are so conclusive as to render further discussion of the subject unnecessary.

5. Neither is it necessary to discuss the question as to whether the legislature had power to confer judicial functions upon the Commission. Section 9, Article VII, of the Constitution before amendment provided:

"All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent

therewith, exclusively in some other court, shall belong to the Circuit Courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers, and tribunals."

As originally adopted, Section 1, Article VII, of the Constitution reads as follows:

"The judicial power of the state shall be vested in a Supreme Court, Circuit Courts, and County Courts, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law, in accordance with this Constitution. Justices of the peace may also be invested with limited judicial powers, and municipal courts may be created to administer the regulations of incorporated towns and cities."

In 1911 this section was amended so as to read:

"The judicial power of the state shall be vested in one Supreme Court and in such other courts as may from time to time be created by law. The judges of the Supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected": Laws 1911, p. 7.

It would appear that the power of the legislature or of the people to confer judicial powers upon any tribunal which it or they may select is, by the force of this amendment, practically an unlimited one so long as the different functions of government, executive, legislative and judicial are not so blended as to contravene Section 1, Article III, of the Constitution, which, as shown in the case last cited, is not the case here.

6. It is next contended that the act is void in that it violates Section 10, Article I, of the Constitution of this state, which is as follows:

“No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

And that also it is in violation of Section 1 of the Fourteenth Amendment to the federal Constitution, as it deprives a person of property without due process of law. Neither of these positions is well taken. Plaintiff's argument proceeds upon the theory that the act establishing the Industrial Accident Commission attempts to establish a court for the trial of causes without a jury, which it does not, and to compel workmen and employers to adjust their grievances without their consent, which is contrary to the whole spirit and intent of the act. As before noted, the act leaves the employer free to accept the provisions of the act or to reject them as he may see fit. If he gives notice that he rejects them, he is left to protect himself from actions for personal injury by litigation in the courts. It is true that the act has swept away certain defenses heretofore available; but, as this could have been done in any case, he has no legal reason to complain. If he sees fit not to avail himself of the provisions of the act, he may still protect himself by giving notice that he rejects its provisions. It is not compulsory, and the arguments that apply with greater or less force to compulsory acts are here inapplicable. The state says to the employer and employee alike:

“We present to you a plan of accident insurance which you may accept or reject at your own pleasure.

If you accept, you must be bound by its terms and limitations; if you reject it, the courts are open to you with every constitutional remedy intact. Take your choice between our plan and such remedies as the statute gives you."

Discussing certain features of the Iowa Compensation Act, limiting the amount to be allowed for certain injuries, Mr. Justice McPHERSON, in the case of *Hawkins v. Bleakley* (D. C.), 220 Fed. 378, 381, says:

"The first twenty-two sections of this lengthy statute fix the liability of the employer and the rights of the employee. A scale of compensation is fixed and made certain. Each party can come within the statute or remain outside of the statute. Each party has his election. Many of the states for many years have had statutes fixing the liability with precision in cases of death, and in no instance has any court held such statute invalid. And why a statute cannot fix with certainty the damages to be allowed in case of the loss of an arm, leg, eye or other injury is not perceived, and counsel fail to state any legal or constitutional objection thereto."

7. It is further contended that the act is unconstitutional because it requires the employee to elect, at the time of his employment and in advance of all injuries, whether or not he will come under the terms of the act. Just what provision of the Constitution is violated we are not informed. It is a general principle that a person may, at any time, waive his right to bring an action upon a money demand unless there is a constitutional or statutory provision prohibiting it, or it is clearly against public policy to permit him to do so. So it has been often held that a contract whereby an employer attempts to stipulate against the consequences of his own negligence is void because contrary to public policy; but what is or is not public

policy is, in its last analysis, a legislative question, and we have yet to find an instance where a statute has been declared void because in the opinion of the court it would have been better policy to have left it unenacted. This view of the act disposes of many of the constitutional questions raised by counsel. The state proposes to employers and employees an accident and life insurance scheme, and offers it to them in lieu of litigation. It does not compel them to become participants in it or to contribute to it, but if they voluntarily choose to do so, they waive any other remedy, because the statute provides as a part of the scheme that they must do so; and, as before observed, by permission of the statute a party may waive or limit the *quantum* of his compensation for any possible prospective injury. The noncompulsory feature of the act may be said to eliminate most of the objections urged upon constitutional grounds.

8. One objection, however, which is urged with much plausibility, is that the act violates Section 7, Article IX, of the Constitution, which is as follows:

“Laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions upon no other subject.”

The evident purpose of this provision was to prevent matters foreign to the general purpose of appropriation bills being attached to them as riders, thereby taking advantage of the necessity of the state for money to defray its current expenses and to pay its officers to pass measures that perhaps would otherwise have been defeated. The instant act is not primarily an act to appropriate money to pay salaries or other current expenses. It is not an appropriation bill in the sense that bills providing for general current ex-

penses or salaries of the constitutional officers of the state are such. We have been cited to no case, in this state or elsewhere, where a provision similar to the one at bar has been construed in accordance with counsel's contention, and in this state contemporary legislative construction has been the other way. Thus, at the first regular session of the legislature held after the adoption of the Constitution, we find an act, entitled "An act for the appointment of a librarian and defining his duties" (Laws 1860, p. 64), was passed, creating the office of state librarian, defining his duties, prescribing the hours during which he should keep the library open, and appropriating \$400 annually for the purchase of books and \$150 annually for his salary. The president of the Senate, the Speaker of the House, and many members of both houses had been members of the constitutional convention. From that time to the present it is safe to say that there has not been a session of the legislature where similar acts have not been passed. Some of them are: The Food and Dairy Commission Act; the Immigration Commission Act, passed in 1885; the Fish Commission Act, in 1887; the State Board of Horticulture Act, in 1895; the Bureau of Labor Statistics Act, in 1903; the act creating the office of State Engineer, and providing a water code, in 1905; the Bank Examiner Act, the Railroad Commission Act, and the Sheep Inspector Act, in 1907; the act creating the office of insurance commissioner and a fund known as the "insurance fund," and the act creating our present water board, in 1909; the act creating the state forestry board, and the act providing for the construction of a branch insane asylum in Eastern Oregon, in 1911; the act providing for a state industrial school for girls; an act creating an Industrial Welfare Commission; an

act creating the state highway commission; and an act creating the state livestock sanitary board, in 1913. Most of these acts fixed the salary or compensation of the officers designated to carry out their purposes and appropriated the money necessary to pay such salaries and to accomplish the general objects for which the law was enacted. An examination of the late session laws of other states having identical or similar provisions in their Constitutions shows that the same legislative practice has been pursued in these jurisdictions, so that it may be said practically the uniform contemporaneous construction of this section of the Constitution is that it does not prohibit the legislature from passing an act designed to effect a particular purpose and in the same act to provide the funds necessary to accomplish that purpose. While such a construction will not be permitted to overturn and render nugatory a clear provision of the Constitution, in cases where the meaning of a clause in the instrument is capable of two interpretations, it is entitled to great weight. It was remarked by Judge COOLEY:

“But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be divested by a decision

that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight": Cooley, Const. Lim. (7 ed.), p. 102.

9. All the considerations suggested by the learned jurist exist here. We sum up the situation: (1) The construction to be placed upon the clause in question is not clear; (2) the construction above indicated has been followed and acquiesced in by the legislature and the people from the adoption of the Constitution until the present time; (3) that construction was adopted by legislators who had participated in the framing of the Constitution and who may fairly be presumed to have known the intent with which it was adopted; (4) to now hold that the acts so passed are void would be attended with such disorganization of public business and destruction of private and pecuniary rights which have grown up with faith in the validity of the acts which would be affected by a decision favorable to the contention of plaintiff as would create widespread confusion and disaster. Our Irrigation Code, Minimum Wage Act, Public Utilities Act, and much of the legislation heretofore alluded to would be thrown into hopeless disarray. Under the act now being considered widows, orphans and helpless cripples who have taken advantage of its provisions would be deprived, in many instances, of their means of subsistence, and be thrown upon the cold charities of the world. These consequences are too momentous to be invoked by a new construction of a doubtful provision of the Constitution. The rule is well settled that a statute will not be held unconstitutional where a reasonable doubt exists as to its invalidity: *Cline v. Greenwood*, 10 Or. 230; *Simon v. Northup*, 27 Or. 487 (40 Pac. 560, 30 L. R. A. 171); *State v. Cochran*, 55 Or. 157, 180 (104 Pac. 419, 105

Pac. 884); *Libby v. Olcott*, 66 Or. 124 (134 Pac. 13); *In re Willow Creek*, 74 Or. 592, 615 (144 Pac. 505).

10. It is further urged that the act is unconstitutional because the original bill was amended in many particulars during its progress through the legislature, and the whole bill as amended was not read by sections on three several days, as required by Section 19, Article IV, of the Constitution. Such has never been the practice in this state, and what little authority can be found on the subject is contrary to plaintiff's contention: *People ex rel. v. Wallace*, 70 Ill. 680. In that case the court says:

"It is also objected that the tenth section of the act was not constitutionally adopted, because it was ingrafted as an amendment whilst the bill was being considered, and was not read on three several days in the house adopting it as an amendment. We are clearly of opinion that the requirement does not apply to an amendment, and the objection cannot prevail."

Other objections are urged, but they are simply variations of those already considered. Upon the whole case we are of the opinion that the act violates no prescription of the Constitution of this state or of the United States, and that it was properly passed and is in every respect a valid law. While experience may suggest from time to time changes and amendments, they are in line with twentieth century progress. Before its enactment one workman out of three received a large compensation for his injuries by an action at law, while the remaining two were defeated and got nothing. Now every workman accepting its provisions receives some compensation if injured; and, taken as a whole, it will be found that more money in the way of compensation is received by the whole body of injured workmen than by the inadequate remedies

afforded in the courts. It has been a boon to the employers, the employed, and the community, which latter could formerly only offer to the injured laborer the charity of the almshouse instead of that just compensation which he may now receive without the humiliation of pauperism or the loss of self-respect.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

MR. JUSTICE BURNETT delivered the following dissenting opinion.

I cannot agree that continued violations shall be dignified into contemporaneous construction of so plain a mandate as Section 7, Article IX, of the state Constitution that:

“Laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions on no other subject.”

I concur in the result of the opinion of Mr. Justice McBRIDE, however, for the reason that, with the whole question before them on the referendum of the act in question, the people approved it at the election of November, 1913, by a vote of 67,814 to 28,608.

Argued November 29, 1915, affirmed January 11, 1916.

UPTON v. STATE INDUSTRIAL ACCIDENT
COMMISSION.

(154 Pac. 113.)

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is an action by Mark R. Upton against the State Industrial Accident Commission of Oregon, and is similar in all respects to that in the case of *Evanhoff v. State Industrial Accident Commission*, ante, p. 503 (154 Pac. 106). A demurrer to the complaint having been sustained, plaintiff appeals.

AFFIRMED.

For appellant there was a brief with an oral argument by *Mr. Isham N. Smith*.

For respondent there was a brief with oral arguments by *Mr. George M. Brown*, Attorney General, and *Mr. J. O. Bailey*, Assistant Attorney General.

MR. JUSTICE McBRIDE delivered the opinion of the court.

The reasoning of the opinion in *Evanhoff v. State Industrial Accident Commission*, ante, p. 503 (154 Pac. 106), applies to this case in every particular, and upon the authority of that case the judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

Argued December 21, reversed December 30, 1915.

HECKINGER v. SWANK.*

(153 Pac. 784.)

Execution—Evidence Sufficient to Discharge Execution Against Person.

1. In a proceeding to obtain a discharge from imprisonment under an execution against the person, evidence examined and held to show that the debtor had no property whatever liable to execution.

Execution—Necessary Parties to Proceedings to Attack—Husband and Wife.

2. Whether a conveyance by a husband to his wife be valid or fraudulent, she is a necessary party to a proceeding to set it aside, and the imprisonment of the husband on an execution against the person cannot be used as a means to extort from the wife the payment of the husband's debts, neither can such imprisonment be made to rest upon mere whim or caprice, or in utter disregard of the evidence.

Execution—Discharge from Imprisonment on Taking Debtor's Oath.

3. Where a party was imprisoned under execution against the person, and was destitute of any means that could be applied to the satisfaction of judgment, it is the duty of the judge to administer the debtor's oath prescribed by Section 4549, L. O. L., and in addition thereto to grant him the certificate of discharge prescribed by Section 4550, L. O. L.

[As to statutes violating prohibitions against imprisonment for debt, see note in 37 Am. St. Rep. 758.]

Fraudulent Conveyances—Right of Husband to Donate Services to His Wife.

4. A husband may rightfully give his services, however valuable, to his wife, and his creditors cannot complain of his so doing. *King v. Foss*, 14 Or. 91 (12 Pac. 281), and *Livesley v. Heise*, 48 Or. 147 (85 Pac. 509), approved and followed.

From Multnomah: HENRY E. MCGINN, Judge.

This is an action by L. E. Heckinger against J. D. Swank. The defendant being imprisoned by virtue of an execution against the person, applied to a judge of

*On the right of husband's creditor's to reach fruits of his management of, or services in connection with wife's separate estate or business, see notes in 21 L. R. A. 623; 23 L. R. A. (N. S.) 1124.

the Circuit Court of Multnomah County for his discharge, which was denied, and he appeals.

REVERSED WITH DIRECTIONS.

For appellant there was a brief with oral arguments by *Mr. Fred W. Bronn* and *Mr. H. L. Ganoë*.

For respondent there was a brief over the names of *Mr. Arthur A. Murphy* and *Messrs. Johnson & Stout*, with an oral argument by *Mr. Murphy*.

In Banc. MR. JUSTICE BURNETT delivered the opinion of the court.

“Every person confined in jail on an execution issued on a judgment recovered in an action wherein the defendant is liable to be arrested, may be discharged therefrom at the end of ten days from his first confinement, upon the conditions hereinafter specified”: Section 4544, L. O. L. After a required notice has been given, the Code specifies that the person shall be taken before the judge, who shall examine him on oath concerning his estate and effects and the disposal thereof, and his ability to pay the judgment for which he is committed, and shall also hear any other legal or pertinent evidence that may be produced by either party. It is further prescribed in Section 4549, L. O. L., that if the judge upon such examination shall be satisfied that the prisoner has no real or personal property conveyed, concealed or in any way disposed of with a design to secure the same to his own use, or to defraud his creditors, he shall administer to him an oath, the form of which is laid down, and grant him a certificate of discharge, upon receipt of which the jailer shall let the judgment debtor go, unless he is detained for some other cause. On appeal the defend-

ant attacks the statute as unconstitutional, and further contends that the court had no jurisdiction to issue an execution against his person, for the reason that the like writ against his property had not been returned unsatisfied. The third basis of attack upon the refusal of the court to discharge him is that the testimony shows that the debtor has no property applicable to the payment of the debt involved. We pass the want of jurisdiction and the unconstitutionality of the act with this remark: That it seems incongruous for the defendant to litigate under a statute which he says is out of harmony with the fundamental law and to ask to be dismissed in a proceeding which would not be undertaken unless the court had rightfully imprisoned him.

1. On the merits a careful perusal of the testimony shows that the debtor has no property whatever liable to execution. The only witnesses examined were himself, a deputy in the county clerk's office, and one of the attorneys for the plaintiff. The utmost that is shown by the testimony of the defendant himself is that in 1907 a lot in Ina Park was conveyed to him; that in 1909 he and his wife joined in a conveyance of the same to Titus & Whittier; and that in 1909 the defendant conveyed to his wife a lot in Albee's subdivision of Glenhaven Park. The defendant, the only witness on the subject, explained that his wife acquired the lot on some kind of drawing, and the title was put in his name by mistake, which he corrected by this deed. All these transactions happened before the parties to this action had any dealings with each other. The defendant testifies that he follows the occupation of real estate broker, and as such managed his wife's affairs and attended to her exchanges and purchases of real prop-

erty, all without charge to her. He says that when they were married his wife had money of her own, which she invested in property, and that he aided her in managing it. He declares on oath that he has barely kept even on his own earnings for several years, and has no property whatever subject to execution, except a judgment for \$150 against some man from whom he has never been able to collect anything. The deputy merely produced records of the conveyances mentioned with some others from the office of the county clerk, and the attorney testifies that he searched the books and discovered that since 1904 the wife appears of record either as grantor or grantee or one of the parties to a transfer in 85 transactions. He says, further, that after judgment had been obtained herein he endeavored to get the defendant to pay the same; that in their interview the latter told him he would consider a cash settlement; but that later in the same conversation he broke off the negotiations. The witness states that the defendant did not say he did not have the cash or could not obtain it, but placed his decision solely on the ground that he would not settle the case.

2. It is not shown anywhere in any of the testimony that a dollar of the defendant's money was ever invested in any of the property now standing in his wife's name. Laying aside the fact that all the transfers to the latter were made long before the transaction out of which the judgment arose, her title, whether valid or fraudulent, could not be divested by this execution against the person of her husband, for she is not a party to this action. Whether the defendant acted in bad or good faith in the matter of her acquisition of title, the real truth is that he at the time had no property subject to execution. The imprisonment of the husband cannot be used as a means to ex-

tort from the wife the payment of his debts. The continuance of the imprisonment cannot be made to rest upon mere whim or caprice, or in utter disregard of the evidence. There is no testimony to sustain the result of the court's examination.

3. Without any dispute whatever the record shows that the defendant was destitute of means applicable to the satisfaction of the judgment, and it was the plain duty of the judge to administer the debtor's oath to him as prescribed in Section 4549, L. O. L., besides granting him the certificate of discharge.

4. In *King v. Voos*, 14 Or. 91 (12 Pac. 281), followed in *Livesley v. Heise*, 48 Or. 147 (85 Pac. 509), it was decided that a debtor may rightfully give his services, however valuable, to his wife, and that his creditors cannot complain of his so doing. That is all that appears to have been done in the present instance. Starting with her own money, the wife might rightfully avail herself of the services of her husband and his business acumen in the management of her property to the betterment of her holdings. A time there was when men might be themselves sold and compelled to render their personal services to those who purchased them; but that is not the law now.

The decision of the circuit judge is reversed and the cause remanded, with directions to administer to the defendant the oath formulated in Section 4549, L. O. L., and to grant him the certificate of discharge described in Section 4550, L. O. L. REVERSED WITH DIRECTIONS.

MR. JUSTICE EAKIN did not sit.

Argued October 28, reversed December 14, 1915, rehearing denied January 4, 1916.

BIRNIE v. LA GRANDE.

(153 Pac. 415.)

Municipal Corporations—Validity of Street Assessment on Nonabutting Property.

1. The illegal assessment for a street improvement that includes a levy against a nonabutting lot does not render void a valid assessment against property otherwise legally liable.

Evidence—When Courts will Take Judicial Notice of City Charter.

2. A municipal charter enacted by legal voters of a city is in its nature the result of a special election, and, unless pleaded, courts cannot take judicial notice thereof in the absence of statutory authority so to do.

[As to judicial notice of municipal ordinances, see note in *Ann. Cas.* 1914C, 1232.]

Municipal Corporations—Validity of Reassessment for Street Improvement.

3. Under City Charter of La Grande, 1909, Section 35, paragraph 9, the city is required to give notice of any proposed street improvement to the owners affected, and having omitted to give such notice, the assessments were held invalid, and any subsequent reassessment under the provisions of said section was also invalid, for the reason that the notice required by the charter was a condition precedent to securing jurisdiction to make the improvement.

Municipal Corporations—Initiative Petition—Effect of Adopting Charter by Commissioners.

4. By Article XI, Section 2, of the Constitution of Oregon, the legal voters of every city and town are granted authority to adopt, amend or repeal their municipal charter, subject only to the Constitution and criminal laws of the state, and where by an initiative petition of the legal voters of the city of La Grande a new charter was presented to the city recorder demanding that it be submitted to a vote at an election to be held later, the act of the commissioners passing an ordinance adopting such charter is not an enactment of such charter, but amounts only to an approval thereof, for the reason that Section 3482, L. O. L., does not provide that the ordination of a city charter or an amendment thereto would have the effect of enacting the same into a law, but it is in the nature of a recommendation approving such charter or amendment, thereby signifying that no competing amendment as provided in said section was necessary.

Constitutional Law—Power to Delegate Adoption of Charter to Council or Commissioners.

5. Under the Constitution of Oregon the legislature does not possess power to authorize a city council or commissioners to either adopt

or amend city charters by ordinance, as that authority belongs to the legal voters of every city and town within the state. (Section 2, Article XI, Const.)

From Union: JOHN W. KNOWLES, Judge.

This is a proceeding by the City of La Grande, Lee Warnick, City Recorder, J. H. McLachlin, Ex-Chief of Police, C. B. Orai, Chief of Police, and Mac Wood, John C. Gardner and J. A. Russell, City Commissioners, and F. J. Lafky, City Manager, to assess certain property within the corporate limits for street improvements. From a judgment of the Circuit Court dismissing a writ of review, the plaintiffs, George S. Birnie, Wm. C. Hanson, M. McMurray, W. Lane, C. W. Bearden, A. J. Martin, R. S. Clapp, Manuel Snider, Edward Burke, J. D. Heidenreich, G. Wagoner, O. W. Moon, M. C. Baker, Irene King, H. L. Underwood, Wm. Miller, E. W. Eastman, Joseph Horstman and Carrie L. Hibbard appeal. REVERSED. WRIT SUSTAINED.

For appellants there was a brief over the names of *Mr. Turner Oliver* and *Mr. Joel H. Richardson*, with an oral argument by *Mr. Oliver*.

For respondents there was a brief over the names of *Mr. James D. Slater* and *Mr. J. P. Rusk*, with an oral argument by *Mr. Slater*.

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

In April, 1912, the council of the City of La Grande proceeded to create an improvement district, and passed a resolution of intention to improve Fourth Street from the south line of O Avenue to the north line of C Avenue by paving, and attempted to give notice thereof. An ordinance was passed, the contract

let, and proceedings were taken for assessing the cost of the work against the property in the district declared to be benefited. The construction was completed and the final assessment made against the premises. The city, however, failed to give the preliminary notice to the property owners as required by the charter. For that reason the assessment was set aside by a judgment of the Circuit Court which has become final. Several other attempts were made by the city to make a reassessment for the improvement. The one sought to be reviewed in this proceeding was made in 1914.

1. The petition asserts as error that the officers of the city had no power under paragraph 37, Section 35, of the charter to include in the improvement district property which was not contiguous to nor abutting upon the street to be improved; yet it is not alleged that any of the realty of either of the plaintiffs belongs to that class.

It may be conceded for the purpose of this case that, if the charter of a city limits the property which can be charged for the expense of street improvements to that which is contiguous to or abutting or fronting upon the street to be improved, the city authorities are not authorized to levy an assessment upon property not embraced within such a description, or nonabutting property, and that an assessment on a lot not so abutting is void: 5 McQuillin, Mun. Corp., §§ 2058, 2059; Page & Jones, Taxation by Assessment, § 620 et seq. It does not necessarily follow, however, that if, perchance, a lot not so abutting should by mistake or otherwise be included in an assessment, the levy would be void as to the contiguous property; in other words, the party whose realty is not benefited should complain, if anyone, and not those who are uninjured: Section 605,

L. O. L. Section 604, L. O. L., relating to a petition for writ of review, requires the same to set forth the errors alleged to have been committed.

The principal question raised in this case by the petition and the return to the writ is in regard to the power of the city to make the reassessment for the cost of such improvement. The petition shows that on June 22, 1909; under and by virtue of Article XI, Section 2, of the Constitution, the City of La Grande adopted a charter, and sets forth the provisions relating to the improvement of streets and making of assessments for the cost thereof, among which is the following: By Section 35 of the 1909 charter the city is empowered by paragraph 37 thereof to levy special assessments for the improvement of streets "upon property which is especially benefited by any such improvement, that is contiguous to or abutting or fronting upon the highway, street, alley, lane or sidewalk to be graded, paved, planked, graveled, curbed, macadamized or otherwise improved or beautified."

Paragraph 9 of that section reads as follows:

"The manner in which all special assessments for any of the purposes provided for in subdivisions 27, 37 and 38 of this section shall be made as follows. The council shall appoint three commissioners to consist of its own members, which said commissioners shall make an examination of all property upon which said assessments are to be levied as to the valuation and extent, if any, of the benefit to be derived by said property by reason of said improvements. Said commissioners shall then make their report in writing to the council. After receiving said report the council shall, before the levy of any special assessment for any improvement, give personal notice for ten days, or in the absence of any property owner, agent or person in charge of said property, by publication in a daily newspaper in said city for a period of ten days to either the owner, agent

or person in charge of said property against which said assessment is to be made of its intention to levy said special assessments, naming the purpose for which special assessments are to be levied, a description of the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements, the estimated cost of such improvement, and designate a time when the council will meet and consider the proposed levy and the granting to any person feeling aggrieved, a hearing before said council. After a compliance with this subdivision the council shall be deemed to have acquired jurisdiction to order the making of such improvements. * * If any assessment is set aside by order of any court, the council may cause a new one to be made in like manner for the same purpose for the collection of the amount so assessed. * * "

This paragraph also provides for a lien against the property so taxed.

2. The petition shows that at an election duly and regularly called in the City of La Grande October 1, 1913, the legal voters thereof amended the charter, changing the municipal government to the commission form, and proceeded in December of that year to elect three commissioners in conformity with the newly amended charter. No mayor was elected, but the three persons chosen have since been acting as commissioners for the city and exercising all the rights and powers formerly exercised by the council of that city under and by virtue of its charter adopted by the legal voters on June 22, 1909. The return to the writ shows the adoption of the charter of the City of La Grande on October 1, 1913, substantially as alleged in the petition. It recites that since the time of the former proceedings the city has adopted a new charter establishing the commission managerial form of government, which provides that all rights, privileges and immunities held and enjoyed by the city, and the taking effect thereof,

shall pass to and be retained and enjoyed by the municipality under the new charter, and that all assessments set aside by the court may be reassessed. All through the long record it appears that the commission acted by virtue of the authority of the charter of 1909. Thus far it appears from the petition and the return to the writ that by the amendment to the charter of 1913 only the form of the city government was changed, and that the authority for making street improvements and assessing the cost thereof upon the property remained the same as under the 1909 charter. No other change in the charter is pleaded or suggested by the return. A municipal charter enacted by legal voters of a city may be termed the result of a special local election, and, unless pleaded, courts of record cannot take judicial notice thereof in the absence of statutory authority so to do: *Mayhew v. Eugene*, 56 Or. 110 (104 Pac. 727, Ann. Cas. 1912C, 33, and cases cited). We will therefore consider the city charter only in so far as pleaded and shown by the return. There is another proposed charter of La Grande which we will mention hereafter.

3. The petition alleges, in effect, that the commissioners of the City of La Grande had no jurisdiction or authority by virtue of the charter to make the attempted reassessment in 1914 after the improvement was made, and that the proceedings thereof were without due process of law and void, as the city officers had not given the required notice in order to obtain jurisdiction in the premises in the first instance before the work of construction was performed. It appears in the 1914 proceedings that the city recorder was directed to prepare notices to real property owners in the improvement district to show cause why such improvement should not be made and assessed; that the notice was prepared and

served upon all but five of the parties named as property owners after the improvement was constructed.

The matter of the power of the officials of the City of La Grande to make a reassessment for the costs of improvements after the same have been constructed, when the city did not obtain jurisdiction in the first instance to levy an assessment for the cost of such improvements upon the property of the district, was decided in the case of *Murray v. City of La Grande*, 76 Or. 598 (149 Pac. 1019), which opinion was rendered since the judgment in the present case. The holding there was, in effect, that where a street improvement assessment was invalid because the notice thereof to property owners, made a jurisdictional prerequisite by the charter, was defective, no subsequent reassessment of the cost of the improvement under the provisions of the charter was valid, since the giving of notice in the terms described by the charter, which was the organic law under which the city acted, was a condition precedent to securing jurisdiction to make an improvement, and to cure the invalidity in the proceedings it was necessary that they be had *de novo*, with valid notice and compliance with the charter in all respects to give jurisdiction. The court also held that in proceedings of such a character the charter plainly contemplates street work to be done in the future, and that, when the improvement is already made, it is impossible to make a reassessment "in like manner for the same purpose" as required by the reassessment clause above quoted. In the opinion Mr. Justice BURNETT clearly points out the powers and privileges of the city in proceedings of this character. Following that case the proceedings for the reassessment under consideration were without authority and void.

4. The record shows that prior to July 16, 1914, an initiative petition, signed by a large number of the legal voters of La Grande, was presented to the City Recorder, demanding that a new charter therewith tendered should be submitted to the legal voters of the city for their approval or rejection at an election to be held in September or October, 1914; that on July 16, 1914, at a meeting of the commissioners, two of them read the charter, and on July 29th pretended to pass an ordinance (No. 786, Series of 1914) adopting such charter for the City of La Grande, and pretended to repeal those of October 1, 1913, and June 22, 1909, but that this charter was not presented to the legal voters of the city for their approval or rejection, as provided by Article XI, Section 2, of the Constitution of Oregon, and by Section 3482, L. O. L.; that the charter so approved by the commissioners purported to continue in force Section 35 of the charter of 1909 as to any improvements contracted for or initiated under its provisions until the final completion thereof. By Article XI, Section 2, of the Constitution, the legal voters of every city and town are granted power to amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon. This power of enactment or amendment was only extended to the legal voters of a municipality. The passage of an ordinance by the commissioners adopting the charter amounts to an approval or recommendation thereof only, and is not an enactment of such charter. Section 3482, L. O. L., which directs the manner of city legislation in the absence of municipal provisions therefor, provides that, when an ordinance, charter or amendment to the charter of any city shall be proposed by initiative petition and transmitted to the city council, that body shall either ordain or reject the same as proposed within 30

days thereafter; and, if the council reject such proposed ordinance or amendment, or take no action thereon, then the same shall be submitted to the voters of the city or town at the next ensuing election. This section reads in part as follows:

“The council may ordain said ordinance or amendment and refer it to the people, or it may ordain such ordinance without referring it to the people, and in that case it shall be subject to referendum petition in like manner as other ordinances. * * Amendments to any city charter may be proposed and submitted to the people by the city council, with or without an initiative petition, but the same shall be filed with the city clerk for submission not less than sixty days before the election at which they are to be voted upon, and no amendment of a city charter shall be effective until it is approved by a majority of the votes cast thereon by the people of the city or town to which it applies.”

This section does not indicate that the ordination of a municipal charter or an amendment thereto would have the force of an enactment of the same into a law, but rather that it is in the nature of an approval or recommendation thereof, signifying that no competing amendment was necessary, as further provided for in this section.

5. Neither would the legislature have the power under the Constitution to confer such authority upon a city council or commission: See *State v. Dalles City*, 72 Or. 337 (143 Pac. 1127). The charter of the City of Forest Grove, in question in *Haines v. City of Forest Grove*, 54 Or. 443 (103 Pac. 775), was submitted to the legal voters of that city; but that case is not authority for the enactment of a city charter by a municipal council or commission. In the present instance it is therefore unnecessary to examine the provisions of the charter proposed in 1914 before it is enacted. It is only

fair to say that the learned city attorney questions the validity of the attempted enactment of the charter by the commissioners.

It appearing from the return to the writ that the authority contained in the former charter for making a reassessment, which has been continued in force, was not extensive enough to sanction the reassessment in question in this case, the judgment of the lower court is reversed, and the writ sustained.

REVERSED. WRIT SUSTAINED.

Submitted on demurrer to writ December 11, demurrer sustained January 4, 1916.

STATE EX REL. v. HARE.

(153 Pac. 790.)

Taxation—Necessity for Estimate of Amount to be Raised Prior to Levy—Statutes.

1. Laws of 1913, Chapter 234, page 458, provided that it shall be unlawful for any tax to be levied, proposed or adopted, for any county, unless an estimate shall have first been made of the amount of money proposed to be raised as provided therein, and that such estimate shall be fully itemized, showing under separate heads the amount required for each department of county government, county office, or county officer, for each county improvement, the maintenance of each county building, structure or institution, for the salary of each county officer or employee, provided, that employees of like salary in each department of county government may be listed by the number of such employees, the amount of each salary and the amount of their combined salaries, for the improvement and maintenance of public highways, roads, streets and bridges, and for the construction, operation and maintenance of each public utility. *Held* that a substantial and not a technical compliance with the law is required, and that it is sufficient to state in one item the amount estimated for roads, bridges, supervisor's salaries, and repairs on machinery and supplies, without designating separately the amount for the improvement, and for the maintenance of each public highway and for each road, bridge, street, etc., for such details are not within the mandate of the law, though if a considerable amount of money was to be raised for the construction or improvement of any particular highway or structure, in order to fully inform the taxpayer, it should be mentioned.

Taxation—Estimate of Amount Necessary to be Raised Before Levy—Statutes.

2. Laws of 1913, Chapter 234, page 458, requiring an itemized estimate of the amount required to be raised before any tax can be levied for county purposes, and Section 6314, L. O. L., providing that county courts shall appoint a road supervisor for each road district in the county, and Section 6319, L. O. L., providing that every road supervisor shall receive for each day necessarily employed in the performance of his duties, the sum of \$2.50, *held* that road supervisors are road district officers, and not salaried county officers or employees, and payment for their services was properly included in the estimate and under the heading "for expenses of roads and bridges," and no one could be injured by such listing.

Taxation—Estimate of Amount to be Raised Sufficiently Complies With Statute.

3. Under Sections 2985, 2987, 6319, L. O. L., and Laws of 1913, Chapter 234, page 458, *held* that in the annual budget or estimate of expenses preceding the county tax levy, an item for salaries, surveys and engineering of the surveyor's office was sufficiently itemized.

Taxation—Estimate of "County Expenditures" Enumerated Prior to Tax Levy—Statutes.

4. Under Laws of 1913, page 686, providing that district attorney in each county shall be paid by the state the salary therein specified, *held* that the district attorney's salary was not a county expenditure required to be enumerated in the estimate of county expenses preceding the tax levy as required by Laws of 1913, Chapter 234, page 458.

Mandamus—Questions must be of Sufficient Importance.

5. The matter involved, in order to justify *mandamus* must be substantial, and of sufficient importance to invoke the use of the remedy.
[As to taxpayers' actions, see note in Ann. Cas. 1913C, 895.]

Mandamus—Unjust Claims or Correction of Errors not Grounds for Issuance.

6. The writ of *mandamus* is used to promote principles of justice, and will not issue to support unjust claims, although technically regular, neither will it be employed for the correction of errors.

Mandamus—Necessity to Demand a More Specific Estimate Before Mandamus is Granted.

7. It does not appear that any request was made to the County Court for a more specific estimate. As a general rule, however, where the duty to be performed by an official is of a purely public nature, and where there is no one person upon whom the right or duty devolves to make a demand for performance, an express demand or refusal is not necessary. There are exceptions to this rule, and where the proper mode of performance is doubtful, a demand specifying the proper mode will be required before the writ will be granted.

Mandamus—Doubtful Nature of Questions Involved.

8. *Mandamus* will issue only in cases of necessity to prevent injustice or great injury, and if there is a doubt of its necessity or propriety, it will not be issued.

Original proceeding in Supreme Court.

This is an original *mandamus* proceeding by the State of Oregon, upon the relation of S. V. Anderson against A. M. Hare, County Judge, Frank L. Owens and George McKimens, County Commissioners, constituting the County Court of Tillamook County, Oregon. The facts involved are set forth in the opinion of the court submitted on demurrer to the writ, for the reason that the same does not state facts sufficient to entitle the relator to the relief prayed for.

DEMURRER SUSTAINED.

Mr. T. H. Goyne, District Attorney, and *Mr. Isaac H. Van Winkle*, Assistant Attorney General, for the demurrer.

Mr. Frank S. Grant, contra.

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

This is an original proceeding in *mandamus* by the State of Oregon on the relation of S. V. Anderson, a taxpayer and resident of the county of Tillamook, against the County Court thereof, to compel it to obey the provisions of Chapter 234, Laws of Oregon for 1913, in three particulars. The first section of that act is as follows:

“It shall be unlawful for any tax to be levied, proposed or adopted, for any county, unless an estimate shall have first been made of the amount of money proposed to be raised by taxation for the ensuing year and such estimate published, and opportunity for a full and complete discussion thereof allowed in the manner hereinafter provided for. The estimates herein required shall be fully itemized, showing under separate

heads the amount required for each department of county government, county office, or county officer, for each county improvement, the maintenance of each county building, structure or institution, for the salary of each county officer or employee, including those whose salary shall be fixed by statute; provided, that employees of like salary in each department of county government may be listed by the number of such employees, the amount of each salary and the amount of their combined salaries, for the improvement and maintenance of public highways, roads, streets, bridges, the construction, operation and maintenance of each public utility, and shall contain a full and complete disclosure of the contemplated expenditures from the money or moneys proposed to be raised by taxation, showing the amount of each public expense. Said estimates shall also contain a statement of the probable receipts of the county proposing such tax from sources other than direct taxation upon the real and personal property in its jurisdiction during the period for which such tax is to be levied, and the amount of all balances, if any, on hand in the funds of said county, at the time such levy will be made. Estimates of the amounts to be raised by taxation shall be made a sufficient length of time in advance of all regular or special meetings at which by law levies are authorized to be made to permit publication as hereinafter provided."

Section 2 provides that the estimates, together with a notice of the time and place at which they may be discussed with the County Court, shall be published. Provision is also made for a meeting of the taxpayers with the members of the County Court.

Section 4 directs in part that no greater expenditure of public moneys shall be made for any specific purpose than the amount so estimated and 10 per cent additional thereof. Section 5 prescribes that:

"No tax shall be levied by the County Court except by direct vote of the people at a meeting duly and regu-

larly called as now provided by law and in accordance herewith for the purpose of levying taxes, in excess of the estimates published as aforesaid and 10 per cent thereof."

On November 17, 1915, the County Court, endeavoring to comply with the statute referred to, found that it would require \$319,238.67 to defray the expenses of that county for the year 1916, and made estimates, a portion of which are as follows:

Road Purposes.

Roads, bridges, supervisors' salaries, repairs on machinery and supplies.....\$173,389.95

Clerk's Office.

Clerk's salary.....	\$1,600.00	
Deputy "	900.00	
Deputy "	780.00	
Records, supplies and expenses.	900.00	4,180.00

The salaries and office expenses of sheriffs and other county officers were estimated in the same manner.

Surveyor's Office.

Salaries, surveys and engineering.....\$2,500.00

—and the district attorney's office, \$2,000. The various items aggregated the amount estimated necessary to be raised.

Complaint is made of the manner of itemizing under three separate heads, namely, "Road Purposes," "Surveyor's Office," and "District Attorney's Office." The alternative writ sets forth:

"That said defendant, County Court, in said estimate under the heading therein, 'Road Purposes' has only set out the aggregate sum proposed to be raised out of the money or moneys received from taxes for the year 1916, for road purposes, and has not, in said

estimate, fully itemized, or set out, under separate heads, the separate amounts which make up said aggregate sum, and required for the (1) improvement, or (2) maintenance, of each public highway, (3) each road, (4) each street, (5) each bridge, (6) the number of supervisors required, (7) the amount of the salary of each, (8) or the amount of their combined salaries, (9) the amount necessary for repairs to machinery, (10) or the amount necessary for supplies. That under the head 'Surveyor's Office,' is set out the items 'salaries, surveys and engineering,' with the aggregate sum \$2,500; but said defendant County Court has not fully itemized under separate heads the (1) number of employees in said surveyor's office; (2) the amount of salary of each employee; (3) the total amount of salaries for said office; (4) the cost of surveys; and (5) the cost of engineering. That under the item 'District Attorney's Office,' said defendant County Court has not fully itemized under separate heads (1) the salary of the district attorney; (2) supplies of said office; (3) or other expense of said office, but has given only the aggregate amount. That said defendant County Court has not given to the taxpayers of said county, a full and complete disclosure of the contemplated expenditures from the money or moneys proposed to be raised by taxation, for the year 1916, for road purposes, surveyor's office, and district attorney's office."

The defendants demur to the writ for the reason that the same does not state facts sufficient to entitle the relator to the relief prayed for.

1. It appears that the County Court made a faithful, painstaking effort to comply with the requirements of the statute. While the result is commendable, it may not be perfect from a technical point of view. Neither is it plain that the relator is legally correct in all his claims. The obvious purpose of the law is to have an estimate of county expenditures made and published, together with the total amount of taxes

levied by any road or school district, city, port or other tax levying authority within the jurisdiction of the county in order that the taxpayers may be informed approximately the amount proposed to be levied against their property and the purposes for which it is to be expended, in order that those upon whom the tax burden rests may oppose or favor any such levy in a discussion with their officers. The statute was not intended to stop the wheels of progress or to be a stumbling block. Taking up the estimates under the three heads complained of, in their order, and looking at the law, we find that it directs an estimate to be fully itemized showing under separate heads the amount required for each department of county government, each county improvement, and maintenance of each county building, etc. When we come to the matter of highways, we find embraced in one group "for the improvement and maintenance of public highways, roads, streets, bridges." The contention of the relator as set forth in the petition and the writ is that specific separate amounts should be designated and expended for the (1) "improvement," (2) or "maintenance," of each public highway, and (3) each road, etc. To distinguish in all cases between an improvement and a maintenance would be exceedingly difficult, if not impossible. We do not perceive that for the purpose of the estimate, the law recognizes a difference between "highways" and "roads." Neither does it require that a street should be given a separate heading. Pursuant to an old custom, bridges are embraced in the same category with roads and highways, yet the relator requests an estimate for "each highway," "each road," "each street," and "each bridge." Such a construction of the statute would be practically injecting into the same the word "each" where it is

not found. The law does not indicate what would be termed a road or highway, or whether it should be designated by name, description or number, as laid out and established, which would seem to be essential if it contemplated a compliance with the relator's demands. Doubtless, if a considerable amount of money was to be raised for the construction or improvement of a particular highway or structure, in order to conform to the spirit of the law and to fully inform the taxpayer, it should be mentioned. That the technical nicety suggested is mandatory in all cases, we cannot concede. Substantially the same difficulties would be encountered were an attempt made to segregate the amount necessary for repairs on machinery from that which would be required for supplies. Such details are not within the mandate of the law.

2. Exception is taken by the relator because the number of road supervisors and the amount of the salary of each are not given in the estimate. These positions are filled by appointment under Section 6314, L. O. L., and their *per diem* compensation fixed by Section 6319, L. O. L. They are road district officers and do not come within the class of salaried county officers or employees within the meaning of the law. Payment for their services is properly included in the expenses of roads and bridges, and no one could be misled or injured by such listing. There was therefore a substantial compliance with the enactment as to public highways.

3. Under the head of "Surveyor's Office" the writ is predicated upon the theory that the surveyor of this county has a retinue of regular salaried employees. It is not alleged that he has such a force, nor do we know it as a matter of law. Except in counties having 39,000 or more inhabitants, under Sections 2985 and

6319, L. O. L., and other statutes, the county surveyor is paid a *per diem* or according to the fee system. That official is authorized to appoint assistants such as chainmen and markers, etc., the maximum of whose compensation per day is fixed by Section 2987, L. O. L. No approximately correct estimate of the expenses of such casual assistance could be made, and the statute does not require it. Neither do we believe the law presumes that the County Court could separate the estimate of the "cost of surveys" from the "cost of engineering." It would seem that if such a segregation of expenses were necessary, the matter should be left to a skilled civil engineer. The writer, not being one, gladly leaves this subject. In legal questions we always expect to find some difficulties.

4. When we come to the district attorney's office there seems to be some misunderstanding as to the law. The relator desires first that the salary of the district attorney be specified. It is only county expenditures that are to be enumerated. In 1913 the legislature provided for a district attorney in each county of the state, and directed that his salary be paid by the state, fixing that of the district attorney for Tillamook County at \$1,200 per annum (Gen. Laws 1913, p. 66), so that the county is not required to bear this burden alone. The present regime has not been long in vogue, and the County Court might not have had much data from which to estimate the expenses of this office separately.

5. In making the 58 estimated items of county expenditures for the coming year, as shown by the writ, 3 of which are complained of, the members of the County Court did not evince any willful disregard of their duty. Neither does it appear that their action was extremely wrong or flagrantly improper: See *State*

ex rel. v. Bare, 60 W. Va. 483 (56 S. E. 390). Indeed, it did not occur to the learned counsel for the relator to assert that by reason of the generalization of the estimated items the petitioner and other taxpayers were unable to gain sufficient information to intelligently discuss the questions with their county servants. On the whole it does not appear that the writ is necessary in order that justice may be done in accordance with the statute. The matter involved must be substantial and of sufficient importance to justify the use of the remedy: 26 Cyc. 156.

6. The writ is employed to promote principles of justice. It will not issue in support of unjust claims, although they may be technically regular: 26 Cyc. 155; 19 Am. & Eng. Ency. Law, section 737, states the rule and its exception thus:

“The writ cannot be used for the correction of errors. If, however, such judgment or discretion is abused, and exercised in an arbitrary or capricious manner, *mandamus* will lie to compel a proper exercise thereof.”

7. No suggestion is alleged to have been made to the County Court for a more specific estimate. As a general rule, where the duty to be performed by an official is of a purely public nature, wherein no individual right or duty is concerned, and where there is no one person upon whom the right or duty devolves to make a demand for performance, an express demand or refusal is not necessary: See Spelling, Ex. Relief, § 1381. The law does not require a useless thing. But there are exceptions to this rule. Where the proper mode of performance is doubtful, a demand specifying the proper mode will be required before the *mandamus* will be granted: Merrill, *Mandamus*, § 224, p. 279.

8. It is also stated by the last-named authority that:

“When a *mandamus* is asked by a private party to compel a public officer to keep his books in a certain way, in order to conform to the statute, he must have requested the officer to do so before he asks for a *mandamus*, because there are often differences of opinion as to the construction of a statute, and the officer should have an opportunity to act on the relator’s construction before being involved in litigation.”

See, also, *State v. Eberhardt*, 14 Neb. 201 (15 N. W. 320). This case, upon which the latter part of the text is based, is the nearest in point of any authority we find: See *Women’s Catholic Order of Foresters v. Condon*, 84 Ill. App. 564; *Ingerman v. State*, 128 Ind. 225 (27 N. E. 499). In the matter under consideration the estimates prepared for publication indicate that the County Court was willing to fully comply with the law, and there appears no refusal to adhere to any reasonable demand if one had been made, thus bringing the case within the exception noted: *People v. Dulaney*, 96 Ill. 503; *State v. Sunset Tel. Co.*, 30 Wash. 676 (71 Pac. 198); *In re White River Bank*, 23 Vt. 478. The writ will only issue in cases of necessity to prevent injustice or great injury. If there is a doubt of its necessity or propriety, it will not go: 26 Cyc. 146.

For the different reasons referred to, the demurrer to the writ should be sustained, and it is so ordered.

DEMURREE SUSTAINED.

Argued October 28, affirmed November 30, 1915, rehearing denied January 11, 1916.

METZLER LUMBER CO. v. FARMERS' MERCANTILE CO.

(153 Pac. 56.)

Appeal and Error—Sufficiency of Undertaking on Appeal.

1. Section 551, L. O. L., provides that the undertaking of the appellant shall be given with one or more sureties to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings, unless the undertaking further provides as follows: (1) If the judgment or decree appealed from be for the recovery of money, or of personal property or the value thereof, and if the same or any part thereof be affirmed, the appellant will satisfy it so far as affirmed; an undertaking literally complying with the statute was not insufficient because it failed to state to whom appellant would pay any amount adjudged to be due upon it.

[As to liability of sureties on appeal bonds, see note in 38 Am. St. Rep. 702.]

Appeal and Error—Only Matters in Bill of Exceptions or the Record Presented for Review.

2. During the pendency of an action plaintiff made an assignment for the benefit of its creditors and the assignee was substituted in its place. No mention is made in the bill of exceptions or the abstract of record of such substitution, neither does it appear that defendant made any objections or opposed the substitution of said assignee or raised the question in any way in the Circuit Court; therefore the contention now urged by defendant that such assignment and the substitution of the assignee in lieu of plaintiff ousted the court of jurisdiction could not be considered.

Appeal and Error—Matters Presented for Review by the Record.

3. In an action by a lumber company to recover the purchase price of material, which defendant contends was furnished to a contractor and not to defendant, testimony was introduced showing that one Eblin, a contractor, was constructing the building, and that an undertaking given by him in connection with said contract was signed by Metzler & Hegsted. *Held* that, in the absence of any pleading showing that plaintiff signed said undertaking, and that it contained terms inconsistent with the present contention of plaintiff, and in the absence of the undertaking from the record, the contention of defendant that plaintiff could not recover because it executed the contractor's bond could not be considered.

Pleading—Admissions Obviate Necessity of Further Proof.

4. Where, in an action for the purchase price of material, defendant's counsel admitted during the trial that the amount of lumber described in the complaint, the reasonable value and the amount alleged in the complaint, was delivered, there was no necessity of any

further proof concerning the amount of lumber, the delivery or its value.

Estoppel—Persons Liable for Purchase Price.

5. In an action for the purchase price of lumber, the fact that plaintiff's president knew that a contractor was erecting the building for which the lumber was furnished, and that he, either as such president or as a member of the firm furnishing the lumber, signed the contractor's bond, *held* not to estop plaintiff from seeking to charge defendant as purchaser of the material so furnished.

Sales—Evidence as to Price Admissible Under Pleadings.

6. In an action for the purchase price of lumber, though plaintiff sued on an implied contract, it was not error for testimony to be admitted tending to prove that the lumber was to be furnished at certain rates, since, when under a complaint based on a *quantum meruit*, testimony is received tending to prove a contract for the amount demanded, the sum disclosed by such evidence will be construed as the reasonable value, in order to effectuate substantial justice.

Sales—Instructions in an Action for Price of Material Approved.

7. In an action by the Metzler-Hegsted Lumber Company, a corporation, for the purchase price of lumber that defendant claimed was sold to a contractor and not to it, where there was no allegation that the Metzler-Hegsted Lumber Company and Metzler & Hegsted were one and the same institution, it was not error to instruct the jury that the bond given by Metzler & Hegsted as surety for the contractor could not affect plaintiff, because it was not a party to the instrument, and could be considered only in determining whether plaintiff had knowledge of the contract between defendant and the contractor, and to contradict the testimony of plaintiff's president, who testified that the lumber was furnished at defendant's special instance and request.

Appeal and Error—When the Order of Introducing Proof will be Considered Harmless.

8. Where testimony was admitted in rebuttal that might have been introduced in chief, defendant's rights were not abused where it had an opportunity to and did oppose the testimony when thus offered.

Appeal and Error—Rights not Affected Appeal will be Affirmed.

9. When the court cannot say that the rights of the appellant have been substantially affected, the appeal will be affirmed in view of Section 556, L. O. L., providing upon an appeal from a judgment the same shall only be reviewed as to questions of law appearing substantially affecting the rights of the appellant.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is an action by the Metzler-Hegsted Lumber Company, a corporation, against the Farmers' Union Warehouse & Mercantile Company, a corporation.

The plaintiff declares in substance that between July 1, 1910, and January 1, 1911, it sold and delivered lumber and building material of the reasonable value of \$2,997.82 to the defendant, which amount the latter promised to pay to the plaintiff, and that no part of the same has been paid, except certain sums, leaving a balance due of \$1,449.59.

Every allegation of the complaint is denied, except the artificial character of the parties, and as affirmatively stated to this effect: That all payments credited in the complaint were sums of money which the defendant, with the consent of one W. D. Eblin, paid to the plaintiff at its request, for Eblin, out of money due him from the defendant.

This new matter was denied by the reply. A verdict and judgment for the plaintiff for the balance claimed resulted after a trial, and the defendant appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief with oral arguments by *Messrs. Crawford & Eakin*.

For respondent there was a brief with oral arguments by *Mr. John L. Rand* and *Mr. John S. Hodgins*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. As a preliminary question it becomes necessary to dispose of the plaintiff's motion to dismiss the appeal. That result is demanded because the undertaking does not state to whom the appellant will pay any amount adjudged to be due upon it. The only authority noted for that contention is *Johnston v. Letson*, 3 Ariz. 344 (29 Pac. 893), cited in 39 Cyc. 678. That case was decided under a statute which expressly re-

quired the undertaking to be given to the respondent. Our Code (Section 551, L. O. L.), says:

“The undertaking of the appellant shall be given with one or more sureties to the effect that the appellant will pay all damages, costs, and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings, unless the undertaking further provides to the effect following: (1) If the judgment or decree appealed from be for the recovery of money, or of personal property, or the value thereof, that if the same or any part thereof be affirmed, the appellant will satisfy it so far as affirmed.”

The undertaking here involved complies literally with this provision of our Code. The precedent above cited is not applicable. The motion to dismiss the appeal must therefore be overruled.

2. It is suggested in the brief that during the pendency of the action the plaintiff made an assignment under the state law on that subject for the benefit of its creditors, and that the assignee was substituted in its place. The defendant argues that this ousted the state court of its jurisdiction over the case. No mention is made of this matter in the bill of exceptions, and it does not appear that the defendant made any opposition to the substitution, or raised the question in any way in the Circuit Court. It is unnecessary to cite authority that we can consider only those errors of the Circuit Court which have been legally excepted to or which appear in the record before us. The abstract filed by the appellant defendant contains no allusion to the change of parties; hence we cannot give it consideration.

3. During the progress of the trial, to support its case, the plaintiff called as a witness one E. J. Metzler, who gave testimony tending to show that the lumber

in question was furnished at the special instance and request of the defendant to be used in the construction of its warehouse. On his cross-examination it was developed that one Eblin was a contractor for the construction of the building; that he had given an undertaking in connection with the contract, which was signed by Metzler & Hegsted, by E. J. Metzler; and that in course of the work the defendant issued its check payable to Metzler & Hegsted, which was cashed on the indorsement of the plaintiff, Metzler-Hegsted Lumber Company. The defendant claims under all this that it shows that the material was furnished to the contractor, Eblin, and not to the defendant, and that in reality the builder's bond was executed by the plaintiff, for which reason it cannot recover in this action. Neither of these contentions is stated in the pleadings. The conditions of the bond are not disclosed, as that instrument does not appear in the record before us. In the absence of any pleading showing that the plaintiff in fact signed the building bond, and that it contained terms inconsistent with the present contention of the plaintiff, we cannot give heed to the assignments of error on that point.

4. The defendant also urges that, taking all the testimony together, the story for the plaintiff is so improbable and unreasonable that a fair mind must reject it, and that the court was in error in not directing a verdict for the defendant after all the evidence was in. In substance, the witness Metzler testified that he interviewed the building committee of the defendant when they were measuring the site of the proposed warehouse, and that they not only requested him to furnish the lumber, but stated to him that, if he did so, the defendant would see that he was paid. During the trial, according to the report of the official stenog-

rapher, the following oral stipulation was made in open court:

"Mr. Crawford: I don't suppose, Mr. Rand, that there is any question about the amount or character of the lumber delivered there for that warehouse; but who the lumber was sold and delivered to, I think, is the main question in the case. At least we are not going to controvert the amount and character of the lumber delivered to the warehouse.

"Mr. Rand: Then I suppose we could consider it admitted that the amount of lumber described in the complaint, of the reasonable value to the amount alleged in the complaint, was delivered; the question being as to whom it was sold.

"The Court: You admit that, do you?

"Mr. Crawford: Yes; we admit that."

This obviated the necessity of any further proof about the delivery of the lumber and the value thereof.

5. The question to be determined was: To whom was the lumber sold? The knowledge of Metzler, who appears to have been president of the plaintiff, to the effect that Eblin had a contract for the erection of the building, and the fact that Metzler, whether as such president or as a member of the firm of Metzler & Hegsted, had signed Eblin's bond, do not constitute an estoppel as against the plaintiff, but can have no greater value than admissions against its interest or contradictory statements. The weight of the testimony as affected by any such factors was for the jury to determine in their quest for the truth. There is nothing in the pleadings preventing the plaintiff from proving the actual truth, notwithstanding the apparent inconsistencies of conduct or statement on the part of its officers. There is ample evidence to take to the jury the question of whether or not the lumber was fur-

nished to the defendant at its special instance and request.

6. Objection was also made to the ruling of the court in allowing the witness Metzler to state that the lumber was to be furnished at certain rates. The defendant argues that this was allowing the plaintiff to recover upon an express contract, after having alleged an implied agreement. But it is stated in *Schade v. Muller*, 75 Or. 225 (146 Pac. 144):

"The rule is quite general that, in an action upon an express contract, the plaintiff cannot recover upon proof of an implied agreement. 9 Cyc. 749. Where, however, under a complaint counting on the reasonable value of services rendered, testimony is received tending to establish a contract for the amount demanded, such sum as disclosed by the evidence will be construed as the reasonable value in order to effectuate substantial justice: *West v. Eley*, 39 Or. 461 (65 Pac. 798). To the same effect, see, also, *Elder v. Rourke*, 27 Or. 363 (41 Pac. 6)."

7. Objection is made to the instructions of the court to the effect that the only purpose for which the jury was entitled to consider the bond said to have been executed by Metzler & Hegsted was to determine whether the plaintiff company had knowledge of the contract between defendant and Eblin, and to contradict the testimony of Metzler. In explanation of the matter the court charged the jury to the effect that the bond could not affect the plaintiff, because it was not a party to the instrument. We think this was a proper construction of the document in the light of the pleadings here, for in the absence of any allegation on the subject it cannot be said as a matter of law that the Metzler-Hegsted Lumber Company and Metzler & Hegsted are one and the same institution.

8. Further errors are assigned upon the admission of testimony in rebuttal that might have been introduced in chief; but the defendant had the opportunity, and used it, to oppose the testimony thus offered. We cannot see that its rights were abused.

9. "Upon an appeal from a judgment, the same shall only be reviewed as to questions of law appearing upon the transcript, and shall only be reversed or modified for errors substantially affecting the rights of the appellant": Section 556, L. O. L.

Under this section we have carefully considered all the assignments of error, and we cannot say that the rights of the appellant have been substantially affected.

The judgment of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE EAKIN did not sit.

Argued December 9, 1915, affirmed January 11, 1916.

REED v. MILLS.*

(154 Pac. 113.)

Replevin—Essentials Necessary to Maintain Action of Claim and Delivery.

1. The action of claim and delivery under Section 283, L. O. L., is purely possessory, and the gist is for the recovery of the possession of personal property wrongfully detained by the defendant and to establish plaintiff's right to possession at the time the action was commenced.

[As to nature of the action of replevin, see note in 80 Am. St. Rep. 741.]

Replevin—Possession of Bond Under Fraudulent Assignment.

2. In an action to recover possession of a \$1,000 bond under Section 283, L. O. L., plaintiff's reply alleged that the bond had been delivered by defendant to one G.; that such was without considera-

*On the right to maintain action to recover property in specie against one not in possession, see note in 18 L. R. A. (N. S.) 1265.

tion, and that the party in possession was only holding it in trust for defendant and subject to his control, and with knowledge of his intent to defraud plaintiff, the motion for nonsuit by defendant at the close of plaintiff's evidence in chief was properly overruled, for the reason an action will lie to recover possession of personal property where defendant has constructive possession as well as actual possession of the property.

Replevin—Instruction as to Setoff in Action of Claim and Delivery.

3. In an action of claim and delivery, an instruction to the effect that the only issue to be determined is whether plaintiff is entitled to the immediate possession of the personal property, and if so, the fact that plaintiff is indebted to defendant will not authorize defendant, without invoking the proper remedy at law, to take possession of plaintiff's property, and apply it or the proceeds thereof to the payment of his claim, is not erroneous.

Replevin—Refusal to Give Requested Instruction in Claim and Delivery Action.

4. To give the instruction requested by defendant would authorize a creditor, without applying the remedy of attachment, to unlawfully take possession of his debtor's personal property, and if sold before the action of claim and delivery could be commenced, apply the proceeds to the payment of his own demand, and return to such debtor the surplus, if any remained, which scheme the law will not countenance, and in refusing such instruction no error was committed.

Appeal and Error—Mistake in Entering Judgment Corrected by Motion in Lower Court.

5. Where in an action of replevin it appeared that the bond demanded had been sold and a new one issued in lieu thereof, and the canceled bond No. 232, series No. 1, of the Realty Associates of Portland, having been received in evidence, its number and series were entered in the judgment for plaintiff, and the judgment further provided that in case a return of said bond could not be had, then for the recovery of \$850, the value thereof, and defendant failed to move to correct the judgment in this respect, such mistake is unavailing on appeal, for the reason that the proper way to correct an error in a judgment entry in replevin is by motion in the court in which it was rendered, and not by appeal.

From Wasco: WILLIAM L. BRADSHAW, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by W. P. Reed and J. M. Reed against W. E. Mills, commenced June 14, 1914, to recover the possession of a bond for \$1,000 issued by the Realty Associates of Portland, Oregon, and alleged to be unlawfully held by the defendant in Wasco

County, Oregon. The complaint is in the usual form. All of its material averments are denied in the answer, except that of the demand and the refusal to deliver the bond. For a further defense it is alleged, in effect, that between February 1, 1914, and May 1st of that year the plaintiffs were the owners of real property in Oregon, and at their solicitation the defendant, as a real estate broker, negotiated the sale of a part of their lands, whereby it became necessary for him to advance on their account \$62.50 interest due on a mortgage upon the premises so sold, which sum they promised to repay; that, in connection with that sale, the defendant, at the plaintiff's request, procured for them a loan of \$2,000, for which they promised to pay him \$40; that between the dates last mentioned the defendant, at the plaintiffs' solicitation, negotiated the sale of other lands for them to L. W. Curtiss for \$12,000, for which service they promised to pay him \$600; that, in order to discharge these obligations, the plaintiffs delivered to the defendant the demanded bond, requesting him to sell it for not less than 80 per cent of its face value, promising to pay him, if sale were made, \$100; that, pursuant to the latter agreement, the defendant, on April 28, 1914, sold and delivered the bond to C. L. Gavin for 85 per cent thereof; and that, after deducting from the proceeds of such sale the sums of money so due the defendant, there remained \$47.50, which prior to the commencement of this action, he tendered to the plaintiffs, and upon their refusal to accept such money left it with the clerk of the court for them.

The reply denies the material averments of new matter in the answer, and for a further defense alleges, in substance, that the defendant voluntarily paid \$62.50,

when only \$43.50 was due, which latter sum the plaintiffs tender in full payment of the demand; that the defendant, acting for himself and L. W. Curtiss, negotiated an exchange of a part of the plaintiffs' land, for which they received a transfer of all the capital stock of The Dalles and Rockland Ferry at \$3,000, a part of which stock was owned by the defendant; that, as further consideration, the plaintiffs received a conveyance of about four acres of land at The Dalles, Oregon, estimated to be worth \$3,000, and also bonds of the Realty Associates of Portland, Oregon, of the face value of \$6,000; that one of these bonds for \$1,000 was never delivered to the plaintiffs, who consented that it might be sold by the defendant, but on April 2, 1914, no sale thereof having been made, they requested him to return the bond, with which demand he refused to comply, and delivered it to C. L. Gavin, who paid no consideration therefor, and held it in trust for the defendant and subject to the latter's control, and with knowledge of his intent to hinder, delay and defraud the plaintiffs.

Predicated on these issues, a trial was had resulting in a judgment for the return of bond No. 232, series No. 1, of the Realty Associates of Portland, Oregon, but, if return thereof could not be had, then for the recovery of \$850, the value thereof, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. John Gavin* and *Mr. Robert R. Butler*, with an oral argument by *Mr. Gavin*.

For respondents there was a brief over the names of *Mr. M. R. Klepper* and *Mr. William H. Wilson*, with an oral argument by *Mr. Klepper*.

Opinion by MR. CHIEF JUSTICE MOORE.

1, 2. The plaintiffs having introduced their evidence in chief and rested, the defendant's counsel moved for a judgment of nonsuit on the ground of a failure to establish a cause sufficient to be submitted to the jury. This motion was denied, and it is contended that an error was thereby committed. It is argued by defendant's counsel that the pleadings conclusively show the defendant had sold and delivered the bond to C. L. Gavin April 28, 1914, or 44 days before this action was commenced, and, since their client did not have possession of the demanded property at that time, this cause should have been dismissed. It is maintained by plaintiffs' counsel, however, that, though the reply admits the defendant had delivered the bond to C. L. Gavin, the transfer was a pretense only, and that the defendant was at all times after it was so delivered in the constructive possession thereof.

The recovery of the possession of personal property, which, under Section 283, L. O. L., is denominated an action of claim and delivery, is substantially the ancient remedy of replevin, and is governed by the same rules which controlled the means originally employed to enforce that right. The action is strictly possessory, and its gist is the defendant's wrongful detention of the demanded property and the plaintiffs' right to the immediate possession thereof at the time the action is commenced.

"Replevin," says an author, "will not lie against one who at the time the action was instituted was neither in the actual nor constructive possession or control of the property, unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ": Cobbey, Replevin (2 ed.), § 64.

In *De Lore v. Smith*, 67 Or. 304, 309 (136 Pac. 13, 14, 49 L. R. A. (N. S.) 555), Mr. Justice McNARY, discussing this subject, observes:

“As an abstract proposition of law, this court has become wedded to the rule that, in order to maintain replevin, defendant should have either the actual or constructive possession of the property sought to be recovered at the time of the commencement of the action, so that defendant, if judgment be rendered against him, might make delivery thereof to plaintiff.”

In the case at bar, if the assignment and delivery of the bond were made by the defendant before the action was commenced, ostensibly to remove it from his possession, though, in fact, he retained control thereof, the action was properly maintainable against him. This was the theory on which the cause was tried. When the motion for a judgment of nonsuit was interposed, the only testimony that had been offered was that given by the plaintiff W. P. Reed. The fact that he did not allude to what his counsel assert was a pretended assignment and delivery of the bond would not have authorized a summary dismissal of the action. In *Andrews v. Hoeslich*, 47 Wash. 220, 222 (91 Pac. 772, 125 Am. St. Rep. 896, 14 Ann. Cas. 1118, 18 L. R. A. (N. S.) 1265), it is said:

“Where, as in this case, property has actually been in appellant’s possession, and has been wrongfully transferred by him without respondent’s knowledge before the commencement of an action for the recovery of its possession, the rule that replevin will not lie against one not in possession at the time of the commencement of the action will not obtain.”

To the same effect, see *Nichols v. Michael*, 23 N. Y. 264 (80 Am. Dec. 259, 262). No error was committed in denying the motion.

3, 4. An exception having been taken to a part of the court's charge, it is insisted by defendant's counsel that an error was committed in instructing the jury as follows:

"If you should find from the evidence that the plaintiffs are entitled to the bond, and should return a verdict in favor of the plaintiffs, your verdict would not prevent the defendant from recovering of the plaintiffs any amount that the plaintiffs may be owing to the defendant; in other words, you are not establishing the question as to whether plaintiffs owe the defendant or not. The question you are to try and determine is whether the plaintiffs delivered the bond to the defendant for the purpose of paying the items which the defendant says the plaintiffs owe him. If the bond was not delivered to the defendant for such purpose, then the plaintiffs would be entitled to recover the same, even if they owe the defendant each and all of the items which the defendant claims the plaintiffs owe him."

An exception having been taken by defendant's counsel to the court's refusal to give a requested instruction, it is maintained that an error was committed in declining to direct as follows:

"I charge you, gentlemen of the jury, that if you should find for the plaintiffs in this case, and find that the bond cannot be delivered, and should find that the plaintiffs have been damaged, you are to deduct from any amount which you may find due the plaintiffs from the defendant as damages the amounts which are due to the defendant, if any, for real estate commissions, negotiation of loan, commission on sale of bond, and for money advanced, and it is admitted and conceded in this case that the sum of \$43.50 is due from the plaintiffs to the defendant, but whether or not the plaintiffs are entitled to recover in this case is a matter for you to determine, and the burden is upon the plaintiffs to prove their case, and, if they fail to do so, your verdict must be for the defendant."

The court permitted the defendant freely to offer testimony tending to prove the plaintiffs were indebted to him as alleged in the answer. This was done to substantiate the defendant's theory by showing a consideration for delivering the bond to him in payment of the plaintiffs' obligations. The plaintiffs' hypothesis was that the bond had been so delivered in order that a sale thereof might be made and the proceeds arising therefrom returned to them. If the latter theory was correct, the defendant had no right to appropriate the bond merely because the plaintiffs might have been indebted to him. In an action of claim and delivery the only issue that can be determined is the plaintiff's right to the immediate possession of the demanded personal property. The fact that a sum of money is due and owing does not authorize a creditor, without pursuing the remedy prescribed by law, to take possession of the debtor's personal property and apply it, or the proceeds arising therefrom, to the payment of his claim. No error was committed in giving the instruction first hereinbefore quoted.

It will be remembered that the reply admitted \$43.50 was due the defendant on account of interest which, it was averred, he had voluntarily paid, and also alleged that the plaintiffs tendered that sum in full payment thereof. The plaintiffs' final pleading did not allege that this amount of money had been offered to the defendant, or that upon his refusal to accept it that sum had been left with the clerk of the court for him. The averment referred to is nothing more than a mere proposal to allow the defendant to take a judgment for the sum of \$43.50. Such offer in an action of this kind is not good pleading, and might upon motion have been stricken from the reply. The

tender was probably set forth in the reply to show to the jury a willingness on the plaintiffs' part to deal justly with the defendant.

To sanction the giving of the requested instruction would permit a creditor, without pursuing the provisional remedy of attachment, to take possession of a debtor's personal property unlawfully, and, if it could be sold before an action of replevin were instituted, the creditor might from the proceeds pay his own demand and turn over to the debtor the surplus of the money, if any remained. While a creditor has an adequate remedy for the recovery of debts due him, the law will not countenance the scheme of obtaining payment of his demands as outlined in the requested instruction, in refusing to give which no error was committed.

5. The complaint did not particularly describe the bond undertaken to be recovered, probably because it had never been in the plaintiffs' possession, but at their request had been delivered to the defendant. It appeared at the trial that, though the bond had been sold, and a new one issued in lieu thereof, the canceled bond was received in evidence disclosing the number and series as hereinbefore set forth.

"The proper way to correct an error in entering a judgment in replevin," says a text-writer, "is by motion in the court in which it was rendered, not by appeal": Cobbey, *Replevin* (2 ed.), § 1092.

To the same effect is the case of *Ingersoll v. Bostwick*, 22 N. Y. 425.

It is difficult to understand how the defendant can be prejudiced by the judgment in the respect mentioned, since he cannot return the bond demanded. But, however this may be, the particularity of the judgment does not appear to have been called to the attention of

the trial court, so as to afford it an opportunity to correct the final determination, though a motion to set aside the verdict and judgment and to grant a new trial was interposed. The defendant's counsel not having specified the number and series of the bond as given in the judgment now complained of, any error committed in such final determination of the cause is unavailing on appeal.

It follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE concur.

Argued October 25, modified November 16, 1915, rehearing denied January 18, 1916.

FIRST NAT. BANK v. SEAWEARD.*

(152 Pac. 883.)

Pledges—Evidence—Conversion of Collateral.

1. In a suit brought to declare a deed a mortgage and to foreclose the same, evidence examined and held sufficient to warrant a finding to the effect that defendants, who had assigned as collateral security a purchase money mortgage and the notes secured thereby, ratified in plaintiff the title acquired from the purchaser, and therefore could not recover the difference between their indebtedness to plaintiff and the amount of the collateral notes, on the ground that the taking of such deed amounted to a conversion of the collateral.

Pledges—Notice of Change in Security Pledged as Collateral.

2. As bearing upon the question of ratification, defendants, who had information that the security had been changed in some manner, and are therefore chargeable with all the facts they might have discovered by making the slightest inquiry. (Citing *McLeod v. Despain*, 49 Or. 536 (90 Pac. 492, 124 Am. St. Rep. 1066, 19 L. R. A. (N. S.) 276).)

Pledges—Must Act Promptly in Making Election to Abide by or Repudiate Transaction.

3. Defendants having information that plaintiff had surrendered the notes and mortgage pledged as collateral and accepted a convey-

*On pledgee's conversion of pledged property by invalid sale, see note in 43 L. R. A. 737.

ance to the premises from the purchaser, it was their duty to act promptly in making their election to abide by or repudiate the transaction.

Pledges—Delay of Three Months Will Constitute Waiver to Treat as Conversion.

4. Conceding there was a conversion, and defendants having the option either to repudiate plaintiff's acts and bring an action at law in trover for damages, or to adopt same and hold plaintiff as a trustee for their benefit, their delay for three months before demanding a surrender of the collateral amounted to a waiver to treat the transaction as a conversion, and the plaintiff is exonerated from such charge.

[As to time within which pledgor may sue to recover pledge or for an accounting, see note in 136 Am. St. Rep. 475.]

Setoff and Counterclaim—Query, Right to Separate Claim of Codefendant.

5. Plaintiff having joined as defendants both the pledgors and the mortgagors, the latter not having been injured and no allegation being made that plaintiff was insolvent, it is doubtful whether the pledgors can set up an alleged conversion as a counterclaim, in view of Section 401, L. O. L., providing that the counterclaim of the defendant must be one upon which suit might be maintained by defendant against the plaintiff.

Mortgages—Conditional Sale or Mortgage Distinguished.

6. In a case where purchasers of land, having given purchase money notes secured by a mortgage on the premises, and the same were assigned to plaintiff by the mortgagee as collateral security, conveyed the land to plaintiff under an agreement that they should be allowed to redeem if they desired, by payment of the debt, the transaction was, as to such mortgagors, a conditional sale, and not a mortgage, the debt being extinguished.

Mortgages—Attorney's Fee in Foreclosure of Absolute Deed as a Mortgage.

7. Section 422, L. O. L., provides that in a suit to foreclose a lien upon real or personal property other than that of a judgment or decree, if it appear that a promissory note or other personal obligation for the payment of money has been given, the court shall also decree a recovery of the amount of such debt, as in case of an ordinary decree for the recovery of money. Defendants S. were indebted to plaintiff, and after selling land and receiving purchase money notes secured by mortgage, delivered such notes to plaintiff as collateral. Afterward plaintiff delivered up the notes and mortgage to the purchaser, and accepted a conveyance of the property. Thereafter this suit was instituted by the plaintiff to declare said deed a mortgage and to foreclose the same, and to recover attorney's fees provided for in the notes involved herein. *Held* that although the collateral notes provided for attorney's fees, and though the notes representing the principal debt also so provided, plaintiff cannot recover compensation for its attorneys.

Tender—When Coupled With Impossible Conditions Insufficient.

8. A tender, in order to be available, must not be coupled with impossible conditions; therefore, a tender made by a debtor, which was

coupled with a demand for the surrender of certain collateral notes which the debtor knew his creditor could not produce, will not be sufficient to stop the running of interest, (Citing 27 Cyc. 1407.)

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

T. M. and E. F. Seawearde are partners composing the firm of Seawearde Bros., and will be referred to for convenience as the Seaweards. Emil E. Dean, Earl M. Dean and A. M. Johnston, with their wives, the defendants, will be referred to as the Deans, all for simplicity of expression. On February 14, 1913, the Seaweards were indebted to the plaintiff, the First National Bank of Ontario, on their notes in the sum of \$14,437.23; the rate of interest being 10 per cent per annum. About January 1, 1911, the Seaweards had sold to the Deans a quarter section of land, then subject to a first mortgage of \$7,000, which encumbrance still exists. As part payment of the purchase price the Deans executed and delivered to the Seaweards five promissory notes, one for \$2,000 and the other four for \$5,000, which were secured by mortgage upon the land. These were conditioned for annual payment of the interest, with the option to the holder of declaring the whole of both principal and interest due on default in paying any yearly installment. The Deans had paid the \$2,000 note. As collateral for their obligations to the bank the Seaweards had indorsed these notes to the plaintiff, and about February 14, 1913, they also assigned to one of the bank officers, for the benefit of the plaintiff, the mortgage securing the Dean obligations. As the result of an effort on the part of the bank to collect the collateral, the Deans, with their wives, conveyed the land to the plaintiff's president for its benefit, receiving the notes, which the bank

marked "Paid," and took from him an option to buy the land within 95 days after February 24, 1913, at the price of \$20,000, with interest at 8 per cent per annum from January 1, 1912, to the date of payment; that being the exact amount of their notes and mortgage. The bank, through its officer who held the mortgage, also canceled that instrument. It is alleged by the plaintiff and denied by the defendants that all this was done after consultation with the Seaweards, and upon an agreement with them to the effect that the plaintiff was authorized to accept a deed from the Deans, return to the latter their promissory notes, and satisfy the mortgage, granting to the Deans an option to repurchase the premises on the terms named, and taking possession of the property, with the right to receive the rents, issues, and profits therein, subject to an additional option, extended to the Seaweards, to repurchase the land at any time on or before November 1, 1913, upon payment of their indebtedness to the plaintiff, together with taxes, interest on the mortgage, and the expenses of maintaining the premises or keeping the same in repair.

The complaint contains a statement to the effect that the bank, acting through its president, entered into possession of the property and managed it, keeping an account thereof up to the beginning of the suit, which showed that the receipts exceeded the disbursements by the sum of \$139.02. It is stated in the complaint, also, that although the option was given by the plaintiff to the Seaweards to repurchase the tract after the expiration of the Dean option, both the Deans and the Seaweards have failed to exercise their privilege or pay any part of the money required. The plaintiff then declares that on March 7, 1913, the Seaweards renewed one of their notes, amounting to \$1,166.11,

making it payable on or before June 1, 1913. Afterward, on July 11, 1913, they renewed the others, to mature on November 1, 1913. The complaint states likewise that the Seaweards have not paid any of their indebtedness, that plaintiff is still the owner and holder of the renewed notes, and that certain sums mentioned are reasonable attorney's fees for their collection. Alleging that the Deans and their wives have or claim to have some interest in the real property inferior to the plaintiff's lien, the prayer of the complaint is in substance that it may have a judgment against the Seaweards for the amount due upon their renewed notes, with interest and attorney's fees, that the deed from the Deans to the plaintiff be decreed to be a mortgage securing the payment of these notes, and that the usual decree of foreclosure and sale be entered upon the same.

This complaint was made against the Seaweards and the Deans and their wives. They all join in an answer, which admits the indebtedness of the Seaweards to the bank, the conveyance by them to the Deans, with the execution of the notes for \$22,000, and the mortgage to secure part of the purchase price to be paid by the Deans, the indorsement of them to the bank as collateral for the Seaward indebtedness, together with the transfer of the mortgage for the same purpose. They deny the statements of the complaint to the effect that the transactions described therein were had with the consent and acquiescence of the Seaweards, and that the latter authorized the bank to accept the deed from the Deans or give any option to repurchase. They deny the renewal of the notes of the Seaweards, the averments about attorney's fees, and other allegations not necessary to mention. Affirmatively the answer gives a history of the indebtedness of

the Seaweards, the execution of the Dean notes and mortgage, and their pledge to the bank as collateral for the Seaward notes, all substantially as alleged in the complaint. They charge that, immediately after securing the assignment of the mortgage, the bank represented to the Deans that it would foreclose the same, as it was the sole owner and holder thereof, and that the proceeding in all probability would leave a deficiency judgment against the mortgagors, who, believing in and relying on such representations, executed the deed already mentioned and delivered it to the plaintiff's president upon a recited consideration of \$30,000, but as a fact without consideration of any kind, except the promise to hold the grantors therein harmless from a deficiency judgment. The defendants say that since the reception of the deed the bank has treated the land as its own, and on various occasions has offered the same for sale and entered into sundry contracts to transfer the title for sums greatly in excess of the indebtedness of the Seaweards. The following allegation then appears in the answer:

“That on said November 1, 1913, that being a day for the transaction of business and during business hours, to wit, at 1:50 o'clock in the afternoon of said date, defendant T. M. Seaward, together with his attorney, W. E. Lees, went into plaintiff's place of business, and where the notes of defendants, T. M. Seaward and E. F. Seaward, were supposed to be kept, and were payable, in the City of Ontario, Oregon, the banking-room and office of plaintiff bank, and at said time and in said place offered to pay said sum of \$15,485.72, that being the total sum claimed and demanded by plaintiff, and that being the total sum, both principal and interest, owing plaintiff by defendants Seaward and Seaward, and did then and there tender to H. B. Cockrum, the duly acting and elected cashier of plaintiff bank, a certified check, drawn by

Seawear Brothers, by T. M. Seawear, on the Ontario National Bank of Ontario, Oregon, and its payment certified by W. F. Homan, the duly elected and acting cashier of said Ontario National Bank, certifying the said check for said sum of \$15,485.72, this being the exact amount claimed as due and owing from defendants, T. M. Seawear and E. F. Seawear, and the sum necessary to pay their said account in full, and this being the custom of making payment of like accounts in this part of the State of Oregon, and defendant T. M. Seawear and defendants' attorney, W. E. Lees, then and there requested and made demand that plaintiff deliver up and return to defendants T. M. Seawear and E. F. Seawear their pledged property, to wit, the said four mortgage notes for the sum of \$5,000 each, or an aggregate sum of \$20,000, principal or face value, and as shown by Exhibits B, C, D, and E of plaintiff's complaint, and a return of said mortgage, a copy of which said certified check is hereto attached, marked Exhibit A of defendants' answer hereto, referred to and made a part of this answer, and at said time and place plaintiff bank, by its said cashier, H. B. Cockrum, he being the only person present, made no objection, either to the sum tendered, nor the medium or kind of money, nor to the manner of payment or tender, nor to anything touching the same, nor has any such or other objections been made to said defendants, or to anyone acting for them, or either of them, subsequent to said November 1, 1913. Plaintiff, by and through its said cashier, at said time and place, to wit, November 1, 1913, and in the office of plaintiff, stated that he and it could not, at that time, deliver said mortgage or said mortgage notes, and failed and refused to state when he or it could deliver them, or that he could or would deliver them, or any of them, at any time, but stated that it was a matter that his father, president of said bank, would have to attend to, and that his father, A. L. Cockrum, president, had just departed for a hunt, or to go hunting, and that he would take it up and attend to it when he returned; but said plaintiff and its said officers and all others

have failed to return to defendants T. M. Seawear or E. F. Seawear, or offer to return to them, conditionally or otherwise, said mortgage, or said mortgage notes, or any part of them."

Alleging their ability to pay the amount mentioned, and that the plaintiff has failed and refused to return to the Seaweards the notes and mortgage pledged for their indebtedness, the latter bring the money into court and deposit the same with the clerk for the plaintiff. The defendants demand judgment for the Seaweards for the difference between the amount tendered and the sum of \$20,000, the face value of the Dean notes, with interest thereon from January 1, 1912, that the complaint be dismissed as to all the other defendants, and for further relief.

The reply challenges the answer in material particulars, and admits trying to sell the property for the purpose of realizing enough to pay the Seawear indebtedness. Plaintiff alleges that its efforts were futile, and were all made by and with the knowledge and consent of the Seaweards. The offer of the certified check, together with the demand for the return of the collateral, are admitted; but the other allegations of the answer in that respect are traversed. A supplemental complaint was filed, covering operations of the farm for the year 1914, averring payment of expenses connected with the land, interest on the first mortgage, for water rents, taxes and the like, showing a total cash paid out of \$1,424.05, receipts \$390.54, leaving a balance due plaintiff of \$1,033.51. It contains allegations about the probable expenses of the premises and receipts for the latter part of 1914 and the crop season of 1915. By stipulation of the parties this pleading was considered as denied by the defendants.

After taking an account on the issues arising on the supplemental complaint, the court found that there remained in the possession of the plaintiff as a result of operating the farm a net balance of \$334.24. We shall not disturb this finding, as there is no testimony against, but much for, it. The Circuit Court entered a decree in favor of the plaintiff against the Seaweards for the principal and interest due upon their notes described in the complaint up to the date of decree, less the sum of \$334.24, making a net balance in the sum of \$17,595.28, with attorney's fees and costs and disbursements.

The decree impressed this amount as a lien upon the land and credited the money deposited by the Seaweards. It also adjudged that the act of the plaintiff in taking the Dean deed and surrendering the notes and mortgage was done with the subsequent knowledge, acquiescence and ratification of the Seaweards, that the bank has not converted any of the property belonging to the Seaweards, and that they have not suffered damage through anything done by the plaintiff. The decree was further to the effect that the deed should be adjudged to be a mortgage, and that upon payment by the Seaweards of the balance due upon the decree at any time prior to the sale of the premises the bank and its president should convey to them the land in question. A sale of the premises was ordered as upon foreclosure of a mortgage, and the defendants were all barred from asserting any interest in the property. They have all joined in this appeal.

MODIFIED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. W. E. Lees, Mr. Geo. E. Davis* and *Messrs. Emmons & Webster*, with an oral argument by *Mr. Lionel R. Webster*.

For respondent there was a brief with oral arguments by *Messrs. McCulloch & Wood*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. Substantially the only controversy of fact is upon the question of whether or not the Seaweards either primarily authorized or subsequently ratified the acts of the plaintiff in taking the deed from the Deans, surrendering to them their notes and satisfying the mortgage. A brief review of the testimony on this subject is *apropos* at the outset. The president, cashier and assistant cashier of the bank all testify that they consulted with the Seaweards about the intended action of taking the deed and surrendering the notes and mortgage, and they approved the same on the ground that it would be much cheaper for all parties concerned to avoid the expense of a foreclosure suit for the purpose of realizing on the mortgage at forced sale. The bank officials also said that within a short time after the execution of the Dean deed they told the Seaweards about it, and they expressed satisfaction over the result. The defendants introduced in evidence a letter of the bank, of date March 1, 1913, as follows:

"Seawear Bros., Ontario, Ore.

"Gentlemen: Your notes are all due and some of them bear date of 1911. Please call at your earliest convenience and make up new notes. We also want to talk over the deal for the Dean land. We now hold a deed for the land and same will be effective June 2nd., if Dean notes are not paid. [Signed by the president of the bank.]"

One of the Seaweards testifies about the option given to the Deans and the successive option given to

themselves to sell the land for the satisfaction of the amount due the bank. They admit knowing about the deed as early as March 1, 1913, and trying to sell the property under their option; but they plead in their answer that they knew nothing of the surrender of the notes or the cancellation of the mortgage until August 1st. They testify, however, that they did not acquire that knowledge until about September 1, 1913, and then only by first searching the records and finding the marginal satisfaction of the mortgage, and afterward inquiring from one of the makers of the Dean notes, who exhibited them to one of the Seaweards, marked "Paid." It is not pretended on behalf of the defendants that the Seaweards ever expressed to the bank any dissatisfaction or dissent concerning these transactions. It is not disputed that they waited until November 1st, when they offered the certified check, coupled with a demand for the return of the collateral. It is not stated that they even demanded the return of their own note or that the bank refused to receive the check. In the light of all this testimony we conclude that it preponderates in favor of the proposition that the Seaweards ratified the action of the bank in taking the deed and surrendering the notes.

2. Besides the actual statements of the witnesses, there are certain conceded circumstances which must affect the case. It is admitted that the Dean deed, dated February 21, 1913, and recorded February 28th of that year, was known to the Seaweards as early as March 1st. So far as the mere land itself was concerned, the situation was then the same as though the bank had foreclosed the mortgage and bought in the tract at the sale under the decree. This result was accomplished without the expense of such litigation and

was advantageous to the Seaweards. They knew that the security had been changed in some manner, and it is a case where they were put upon inquiry, and are clearly to be charged with a knowledge of all they might have learned in March by making the slightest inquiry. It is within the principle of *McLeod v. Despain*, 49 Or. 536 (90 Pac. 492, 124 Am. St. Rep. 1066, 19 L. R. A. (N. S.) 276), holding that:

“A person who learns of unusual circumstances connected with a transaction in which he is about to be interested, or of such facts as would put a person of ordinary prudence upon inquiry, * * is bound thereby to a knowledge of what could have been discovered by investigation.”

3. Moreover, the defendants plead that the Seaweards knew of the surrender of the notes and mortgage as early as August 1, 1913. They testify that they became aware of it by September of that year. Whether they discovered it in March or in September, they had the alternative of either adopting the transaction or of repudiating it, and it was their duty to act promptly in making their election. Writing on a kindred subject, Mr. Justice WOLVERTON, in *McCourt v. Johns*, 33 Or. 561, 569 (53 Pac. 601, 604), uses this language:

“When cause exists for rescission, the law requires the party seeking to take advantage of it to act without delay, so that the other party to the contract may be placed as nearly in *statu quo* as possible; and a non-observance of the rule will generally constitute a waiver of the right to rescind”—citing *Foley v. Crow*, 37 Md. 51.

4. Again, conceding, without deciding, that the bank really was guilty of a conversion of the collateral, for which an action of trover would lie, yet the Seaweards had the alternative of repudiating the same and bring-

ing an action at law for damages, or they might adopt the same and hold the bank as a trustee for their benefit, and enforce the trust: *Kelly v. Matlock*, 85 Cal. 122 (24 Pac. 642). Under all these circumstances, even from the admitted viewpoint of the Seaweards, the two or three months' delay in calling upon the plaintiff for a surrender of the collateral counts strongly as showing a waiver of their rights in that particular, and they must be considered in fact as having ratified the action of the bank by not expressing their disapproval when they had knowledge of all the circumstances. Their duty to speak arose at once when they became aware of the whole transaction, and taking them at their word, aside from their denials of knowledge, which are disputed by witnesses for the plaintiff, they must be bound by the situation, in which they did not dissent for more than two months after obtaining a full knowledge of it. As a necessary corollary to this the bank is exonerated from the charge of having converted to its own use the property of the Seaweards.

5. Further, if the bank in truth converted the securities of the Seaweards to its own use, the transaction would give rise to an action at law in trover for the tort thus committed. This being a suit in equity to subject the land in question to the payment of indebtedness, we may well doubt that it was permissible to interpose as a counterclaim the chose in action for the tort of conversion, especially at the suit of both the Seaweards and the Deans, the latter of whom profited by the transaction. It is said in Section 401, L. O. L.:

"The counterclaim of the defendant shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit; and in addition to the cases cited specified in the subdivisions of Sec-

tion 74, it is sufficient if it be connected with the subject of the suit."

We cannot conceive that an original suit in equity would lie for the tort of conversion, especially without an allegation that the plaintiff here is insolvent and unable to respond in damages for the wrong alleged.

6. It remains to consider the nature of the transaction as respects the defendants Dean. As already stated, they took a written option giving them the privilege of repurchasing the land upon payment of an amount equivalent to the principal and interest of their notes. The rule is thus laid down by Chancellor Kent, as quoted in *Kramer v. Wilson*, 49 Or. 333, 341 (90 Pac. 183, 187), by Mr. Commissioner SLATER, in distinguishing between a conditional sale and a deed absolute on its face, and intended as a mortgage:

"The test of the distinction is this: If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt be extinguished by the agreement of the parties, * * and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitle himself to a reconveyance, it is a conditional sale."

In view of the fact that the Deans did not assert any right to redeem and have in possession their notes, and the mortgage securing the same has been satisfied, the transaction must be held to be a conditional sale as affects them. Under all the circumstances, the substance of the situation is that the form of the security for the Seaward indebtedness was changed from that of the Dean notes and mortgage to the deed for the land. On the face of the record the plaintiff holds the property; nevertheless not actually as its owner, but subject to redemption on payment of the debt.

7. As distinguished from an action at law, the plaintiff had no cause of suit directly against the Seaweards upon their notes. Their direct liability to the bank accrued solely by virtue of their promissory notes, upon which only an action at law would lie; and this suit is not properly one to recover the amount due upon those instruments. It is purely a proceeding *in rem* against the land, to realize upon it as collateral for the payment of the Seaward debt. The plaintiff, seised as it is of the legal title, comes into court and calls upon the Deans to assert or abandon their option to buy the land, and upon the Seaweards to offer anything showing a reduction or discharge of their indebtedness, to the end that a decree may be entered adjusting the rights of the parties in the realty. On the refusal of the bank to accept a proper tender of the amount due to it on their obligations, the Seaweards could have brought suit to redeem the land. On the other hand, in default of payment of the Seaward notes, the plaintiff here has the corresponding right to carry on this proceeding in the nature of strict foreclosure to compel redemption or sale of the premises. That this is a suit to enforce the collateral, and not a proceeding to recover the original debt of the Seaweards, is shown in *State Bank v. Casaccia*, 103 Cal. 641 (37 Pac. 648), and *MacArthur v. Magee*, 114 Cal. 126 (45 Pac. 1068).

If the bank had sued upon the Dean notes and foreclosed the mortgage securing the same, it could have recovered attorney's fees provided for in those securities; but it has surrendered the only instruments authorizing an attorney fee in a suit to realize upon the collateral. It cannot recover such a charge upon the Seaward notes, because this suit is not directly upon them. It was necessary to allege the amount and

nature of the indebtedness of the Seaweards to enable the court to make a proper decree disposing of the collateral; but the direct recovery upon the Seaward notes is not here involved as a matter of law, although the plaintiff is demanding a decree directly upon them. The bank never had a direct cause of suit in equity upon the Seaward notes, for the reason that they were personal obligations, to enforce which the remedy at law was plain, speedy and adequate. The only equitable relief that ever accrued to the bank had its origin in the Dean collateral notes and mortgage. In legal effect the present suit is an effort to realize upon the collateral in its changed form, and while the relief to be granted may be narrowed, as it is by the surrender of the personal obligations of the Deans, it can never be expanded beyond its original scope. It is plain that, if the Dean collateral had not been given up in exchange for the deed, the bank could not have sued in the same proceeding on both the Seaward notes and the Dean notes and recovered attorney's fees on both at once. In this effort to realize upon the collateral the relief to be granted cannot rise higher than its source, and if in an original suit to foreclose the Dean mortgage an attorney fee upon the Seaward notes could not have been allowed, it cannot be permitted here. We are not unmindful of the provisions of Section 422, L. O. L., reading thus:

“A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as princi-

pal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money."

The debt mentioned there means nothing but the obligation for which the mortgage is directly given. It does not refer to an obligation for which a mortgage and its principal debt are merely collateral. In other words, the complaint in this suit does not state facts sufficient to authorize the direct recovery of the Seawearde debt to the bank, for there has always existed a plain, speedy and adequate remedy at law for such relief. The complaint is potent only for the purpose of applying the proceeds of the Dean collateral to the payment of the Seawearde notes, and there can be no personal decree against the Seaweardes in this suit. We conclude, therefore, that plaintiff cannot recover its alleged compensation for attorneys.

8. We pass to the consideration of the effect of the Seaweardes offering a check coupled with the demand for the return of the Dean notes. As already stated, the Seaweardes knew at the time they offered the check that the bank did not have custody of the original collateral and could not deliver it. They appended to their so-called tender an impossible condition, and having, as we have seen by preponderance of the testimony, ratified the act of the bank in surrendering the notes, they had no right to annex that proviso to the offer of the check. To be available for stopping interest on the demand, the offer to pay must be without restriction, except such as the one making the tender has the right to impose.

"A tender must not be coupled with any other conditions than those which it is the clear legal duty of the mortgagee to fulfill on receiving payment or satisfaction": 27 Cyc. 1407.

If the Seaweards had applied to the bank to pay their debt before the surrender of the Dean notes, they would have had the right as a condition of paying the debt to demand, not only their notes, but the collateral securing the same. Having waited until after the form of the collateral had been changed, in which the preponderance of the testimony shows they acquiesced, the Seaweards had no right to demand the impossible from the bank. The tender as a stoppage of interest must be disregarded, because it was coupled with the wrongful condition that the collateral must be surrendered.

All this leads to a modification of the decree of the Circuit Court in the following manner: The plaintiff is entitled to a decree of this court to the effect that if, within 90 days after the filing of our mandate in the Circuit Court, the Seaweards shall pay into that court for the plaintiff the balance of principal and interest at 10 per cent per annum of their notes to the date of payment, less the amount of the tender and the balance of \$334.24 derived from the farming operations, both to be credited as of June 28, 1915, the date of the decree in the court below, the plaintiff bank and its president, who holds the legal title to the premises, shall convey the same to the Seaweards by good and sufficient deed, duly executed and acknowledged, so as to entitle the same to record, and shall thereupon, and not otherwise, be entitled to the money so paid into court. Further, that if the plaintiff shall fail to execute and deliver the deed to the Seaweards, or to the clerk of the Circuit Court for them, as thus required, the decree shall stand and operate as such deed. If the Seaweards fail so to redeem the land, the same shall be sold in the manner provided by law and the proceeds applied to the payment of the balance so com-

puted, with interest at 10 per cent per annum to the day of sale, together with the expenses of sale, the remainder, if any, to be paid to the Seawards, and that all the defendants and each of them be otherwise barred and foreclosed from asserting any interest or title in or to the property involved.

MODIFIED. REHEARING DENIED.

MR. JUSTICE BEAN delivered the following opinion, concurring in part.

I concur in the main part of the able opinion of **Mr. Justice BURNETT**. However, the plaintiff bank was compelled to institute this suit against the defendants Seaward to collect the notes given directly by the latter to plaintiff, and I think the bank is entitled to a reasonable attorney's fee in this suit, according to the provisions of the several notes.

Argued October 28, reversed December 7, 1915, rehearing denied January 18, 1916.

HALL v. CATHERINE CREEK DEVELOPMENT CO.*

(153 Pac. 97.)

Corporations—Representation by Promoter—Rescission of Contract—Fraud.

1. Plaintiffs appointed as their agent, to sell land on commission, one whom they knew to be interested in promoting a corporation to buy lands for development purposes. They gave such promoter an option to buy the land at the regular selling price. The land was sold to the corporation, a portion of the purchase price being paid in cash and a mortgage executed by the corporation to plaintiffs for the balance. The corporation, on discovering the fraud, rescinded the pur-

*On liability of promoter on sale to corporation of property for sale of which promoter is agent, see note in 18 **L. R. A. (N. S.)** 1115.

On waiver of promoter's right to rescind, see note in 30 **L. R. A. (N. S.)** 872.

chase, tendered back a deed, and demanded repayment of the advance payment on the price. *Held*, in a suit to foreclose a mortgage, that defendant corporation was entitled to a cancellation of the note and mortgage and to a judgment for the amount paid on the purchase price.

[As to rights and liabilities of promoters, see note in 17 *Am. St. Rep.* 161.]

Corporations—Promoter's Contract—Rescission—Laches.

2. The fact that defendant corporation did not rescind the contract for some months after the execution of the note and mortgage at which time they received definite notice of the facts constituting the fraud did not constitute such laches as to preclude the assertion of the right to rescind in a foreclosure suit brought shortly after the discovery of the fraud.

Vendor and Purchaser—Rescission—Interest.

3. A purchaser of land who rescinds the contract on the ground of fraud cannot recover interest on a payment made on the price, where he had possession of the land during the time the contract remained in force.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by G. F. Hall, W. A. Hall and M. M. Hall against the Catherine Creek Development Company, a corporation, to foreclose a mortgage on land in Union County, securing three promissory notes of \$7,000 each.

With a few exceptions, not important to the discussion, the complaint is admitted. In substance the defense is that one W. B. Wilson was a promoter and organizer of the defendant corporation, and was at the same time in the secret employ of the plaintiffs, who had agreed to give him \$3,000 if he would effect a sale of the premises at \$36,000; that the defendant was organized for the purpose of purchasing and developing the real estate involved, all with the cognizance of the plaintiffs. The purport of the remainder of the answer is that during all the negotiations the plaintiffs were aware of the double dealing of the promoter Wilson, and, in ignorance of his secret understanding and agreement with them the defendant paid \$15,000

of the purchase price in cash, giving the notes and mortgage mentioned in the complaint in discharge of the balance; that, having afterward ascertained the secret arrangement mentioned, the defendant repudiated the transaction, tenders a deed reconveying to the plaintiffs the land, and demands the return of the installment paid in money.

The reply denies the substantial part of the new matter of the answer. It avows that for at least three years prior to the defendant's purchase of the land Wilson was employed by the plaintiffs to find a buyer for the realty, with the understanding between him and them that if he were successful, he would be well compensated therefor; that in the month of August they made, executed, and placed in escrow their promissory note for \$3,000 to him to be delivered to him when the sale should be consummated, and that it was so delivered about September 7, 1912, when the land was sold. The plaintiffs disclaim any knowledge that Wilson was in any way interested in the purchase, or that he had anything to do in organizing or incorporating the defendant company, and aver that they acted in good faith in the whole transaction. After a hearing, the Circuit Court entered a decree according to the prayer of the complaint, and the defendant appeals.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. James D. Slater* and *Messrs. Beach, Simon & Nelson*, with oral arguments by *Mr. Slater* and *Mr. Roscoe C. Nelson*.

For respondents there was a brief over the names of *Messrs. Crawford & Eakin* and *Mr. B. F. Wilson*, with oral arguments by *Mr. Crawford* and *Mr. Eakin*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. It seems to be unquestioned that as a matter of fact Wilson had been employed by the plaintiffs to find a purchaser for the land at \$36,000, and that they agreed to pay him \$3,000 for his services without the knowledge of the corporation or any of its officers or stockholders, except Wilson himself. It is without dispute that he did assist in the formation of the company, became a stockholder and officer therein, and was such official at the passing of the title. It is common learning that as between the corporation and its double dealing promoter such a transaction is fraudulent. The vital question in this case, however, is to determine how the plaintiffs here, the grantors in the conveyance, are affected. It is disclosed by the testimony that they not only commissioned Wilson to find a purchaser for the land like any ordinary real estate broker, but also equipped him with an option to purchase the same for himself at the price of \$36,000. The president of the corporation, who was also one of its promoters and organizers, testified to the effect that Wilson enlisted him in the project of the purchase and development of the tract and ultimately assigned to him a half interest in the option; that together he and Wilson went to view the premises in company with one of the plaintiffs, G. F. Hall, and discussed in his presence the formation of the corporation in which both Wilson and Kingsbury, the subsequent president, were to be interested for the purpose of taking over the property and carrying on the scheme of development; and that plaintiffs knew the relationship Wilson sustained to the prospective company. According to his statement, Kingsbury, after the sale,

inquired of G. F. Hall about a possible commission having been paid to Wilson, when Hall reluctantly admitted that they had given him something, but refused to state the amount, referring the inquirer to Wilson himself. At the first opportunity Kingsbury propounded the same query to Wilson, who flatly denied that he received any compensation whatever from the plaintiffs. Afterward, however, having secured an additional clue from another source, the witness again taxed G. F. Hall with the matter, and thus relates the result:

“He said, ‘Well, there is no use beating around the bush. I know you have got all the information; you got it from Mr. Fear at the bank’; and he said, ‘We did pay Wilson a \$3,000 commission.’ ”

Thereupon Kingsbury, as president of the defendant, demanded a rescission of the contract and a return of the \$15,000. Wilson subsequently made written admission of the fact that he had received that amount of money from the plaintiffs for his services. The principal evidence coming from the plaintiffs on this point is found in the cross-examination of G. F. Hall:

“Q. Now, isn’t it a fact that you told Mr. Kingsbury just in the words he gave in his testimony here—‘I see you have got the whole thing; I had just as well own up’—or words to that effect?

“A. I don’t think it was in that language.

“Q. Wasn’t in that language? Well, it was something like that, wasn’t it?

“A. I told him that he knew the amount, and it wasn’t necessary—well, I don’t know but what I used the words he said; beat around the bush. * * ”

On the knowledge of plaintiffs concerning Wilson’s interest in the corporation the same witness testified as follows:

"Q. Didn't you know that he had an interest and intended to take an interest in the development of that property?

"A. I knew he was interested in getting the thing going, but I didn't know what his interest was.

"Q. Oh, you didn't know what his interest was?

"A. No, sir.

"Q. You knew all of the time that he was intending to take an interest in the development of the property?

"A. No, I didn't know what his interest was.

"Q. I say, you knew that he was going to take an interest in that?

"A. Why the only way you can put that—I knew he was helping to push the project to completion, and taking an active part in it, but what his interest was I didn't know.

"Q. Well, now, Mr. Hall, isn't it a fact that you knew that he was to have a part of the proceeds or profits, whatever there was?

"A. I don't know what this arrangement was in regard to the proceeds or anything about it.

"Q. You heard him talking with Mr. Kingsbury when they were up there, didn't you?

"A. Yes; he talked about different things, and about the investment and about the project being a good one.

"Q. Yes, and isn't it a fact now in your presence, while you were talking there, they figured up the probable gain or profits that could be made?

"A. I don't know as any stated amount. They spoke about it being a profitable proposition all of the time, which I thought it was."

Further as to the alleged concealment from the defendant of Wilson's commission, the sworn statement of G. F. Hall is found in this excerpt from his testimony:

"Q. Now, then, Mr. Hall, you knew that Mr. Wilson did not want Kingsbury to know, didn't you?

"A. Well, you might apply it in that way, but as for anything direct, why I would not know any more than

just naturally anybody would know about the transaction.

"Q. You did not expect him to get the information from Mr. Wilson, did you?

"A. Sure, I did. I supposed when he would ask Mr. Wilson, it would be up to Mr. Wilson to tell, because I had told him there would be a payment made.

"Q. You say there was never in the whole transaction any reason why you should not tell Mr. Kingsbury all about the commissions, was there?

"A. Why, I could have told him if I had felt disposed to, but I didn't feel disposed to tell any more than I did.

"Q. You now claim there was nothing in the whole transaction that would prevent you from disclosing it?

"A. Only impliedly.

"Q. Only impliedly—and that was implied through Mr. Wilson?

"A. Well, through the circumstances of the deal.

"Q. Through the circumstances of the deal? And you knew about that at the time the deal was made, didn't you?

"A. I knew that we had given Mr. Wilson a note for \$3,000 to make this sale, and I had no occasion to go and tell Mr. Kingsbury or anybody else what we were giving. We had our price, and if Mr. Wilson sold at that price, and we were willing to pay him a commission, we considered that was our business and our privilege.

"Q. You impliedly knew at that time that Mr. Wilson did not want Mr. Kingsbury to know about the commissions, didn't you—I mean at the time you gave the note?

"A. Well, in an implied way, of course, I knew it."

It is beyond controversy that the plaintiffs constituted Wilson their agent to find a purchaser for the land. They not only did this, but they also gave him the additional character of an optionee to purchase the same in his own right. It is also thoroughly es-

tablished that, assuming the latter guise and concealing the fact that he was in the pay of the opposite party, Wilson ingratiated himself into the confidence of Kingsbury, and as his coadjutor formed the corporation for the purpose of taking title to the land at the price of \$36,000. Viewed in the most favorable light for the plaintiffs, however innocent they may have been in their intentions, they made it possible for him to assume either of two characters he might choose for the purpose of getting the defendant to purchase the land. In fact, he was acting as agent for both parties without the knowledge of the defendant. He dealt in gross violation of his duty to the latter by concealing from it that he was in the pay of the other party.

Hall's admission that he knew Wilson was helping Kingsbury to push the project to completion, and taking an active part in it, imputes to the plaintiffs knowledge that Wilson was at least acting as promoter of the corporation, and consequently, that he was in its confidence and in duty bound to act in good faith toward it. It makes no difference that according to Hall's claim he did not know what his interest was. He does not disclaim knowing that he had some interest. His own testimony is to the effect that he did know Wilson was a promoter of the defendant. The transaction was in fact tainted with fraud as against the defendant. By clothing Wilson with the option as well as the employment to find a purchaser, the Halls equipped him for possible double dealing, and at least placed themselves in the position of one who by an innocent act makes it possible for another to deceive to his hurt a third party who is equally innocent. The law is unquestioned that in such cases the loss, if any, must fall upon the one who made such a result possible. This is the rule laid down in *Fiore v. Ladd*, 22 Or. 202 (29

Pac. 435); *Copeland v. Tweedle*, 61 Or. 303 (122 Pac. 302); *Banker's National Bank v. Western Union Cold Storage Co.*, 73 Ill. App. 410; *Stoney Creek v. Smalley*, 111 Mich. 321 (69 N. W. 722). Charged with the knowledge before the sale that Wilson was interested in promoting the project, and hence held the role of defendant's confidential agent, the plaintiffs are within the principle enunciated in *Kuntz v. Tonnele*, 80 N. J. Eq. 373 (84 Atl. 624). In that case the defendant having land for sale agreed with the plaintiff's agent sent to buy it to add a sum to the purchase price, which increase on payment by the plaintiff should be given to the agent. This was held to be fraudulent in both the representative and the defendant.

Again, the plaintiffs cannot accept the benefits of a transaction which is tinctured with the fraud of their own agent without suffering the consequent penalty of rescission at the election of the injured party: *Dresher v. Becker*, 88 Neb. 619 (130 N. W. 275).

2. The plaintiffs contend that the defendant was guilty of laches in not promptly disavowing the contract. The testimony convinces us, however, that although the president of the corporation instituted inquiries some months before renouncing the agreement, he was not able to discover anything definite enough to call for action until a very short time before the suit was commenced, when he demanded rescission as stated in his testimony. Mr. Justice WOLVERTON, in *Raymond v. Flavel*, 27 Or. 219 (40 Pac. 158), said:

"The notice must be more than would excite the suspicion of a cautious and wary person; it must be so clear and undoubted, with respect to the existence of a prior right, as to make it fraudulent in him afterwards to take and hold the property."

Applied to the instant case, until the plaintiff G. F. Hall finally refused to beat about the bush further, and frankly admitted having paid \$3,000 to Wilson, there was nothing more imputable to the defendant than mere suspicion which would not necessarily demand hostile measures on its part.

3. These considerations lead to the conclusion that the decree of the Circuit Court is reversed, and that the defendant is entitled to a rescission of the contract and a return of the money which it paid, together with a cancellation and return of its note and mortgage, so that, as far as possible, the parties may be restored to the condition in which they were at the inception of the transaction. Having had possession of the land, the defendant cannot recover interest on the cash invested. The decree here will be framed accordingly.

REVERSED. REHEARING DENIED.

MR. JUSTICE EAKIN and MR. JUSTICE BENSON did not sit.

Argued October 28, affirmed December 14, 1915, rehearing denied January 18, 1916.

MILLER v. WEAVER.*

(153 Pac. 465.)

Brokers—Contract to Compensate Loan Brokers for Procuring Loan.

1. Plaintiffs and defendant executed an agreement in writing wherein plaintiffs were to procure a loan of \$5,500 for term of 5 years, with an option of paying \$1,000 per year, or the whole amount in 3 years, at 8 per cent secured by first mortgage on the farm owned by defendant, for which defendant agreed to pay plaintiffs \$220, and further agreed that if for any reason defendant was unable or unwilling to close said loan, he agreed to pay the said \$220 to plaintiffs for their services. Plaintiffs promptly procured the loan and performed all the conditions of such agreement, and defendant refused to

*On right of broker to compensation as affected by default of principal, see note in 43 L. E. A. 593.

execute the mortgage as agreed, and plaintiffs thereupon brought this action to recover the \$220 agreed on as their compensation. Defendant alleged in his answer that the contract was to become void in case the mortgagee should refuse to cancel his mortgage, in order that a first lien could be given on the land; that said mortgagee refused to release his lien, and plaintiffs were promptly notified of such fact. In view of the record that no testimony was offered tending to show the legal delivery of such agreements to plaintiffs, or facts from which a valid possession of the contract could be inferred, *held* that the verdict of the jury in favor of defendant and the judgment rendered thereon would not be disturbed. (Citing *Hoag v. Washington-Oregon Corporation*, 75 Or. 588 [147 Pac. 756].)

[As to effect of retention by principal of benefit of loan procured by agent without authority, see note in *Ann. Cas.* 1913E, 1115.]

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Wm. Miller and A. C. Miller, doing business under the firm name and style of Wm. Miller & Bro., against J. R. Weaver to recover money. The facts are that the defendant purchased from H. Towner a farm near Elgin, Oregon, the title to which was encumbered by a mortgage of \$2,000 in favor of the state land board. Weaver, to evidence a part of the purchase price, executed to the vendor a mortgage of the premises for \$5,500, with interest, which amount matured in the fall of 1911. Towner at that time demanded payment, whereupon Weaver applied to the plaintiffs, who represented a loan company, to obtain for him a loan, but they were then unable to secure any money, and the defendant was granted another year in which to pay the debt. At the expiration of the extension Towner again required payment, whereupon Weaver once more applied to the plaintiffs to accommodate him, and subscribed his name to a writing, which reads:

"This is to certify that I, J. R. Weaver, the undersigned, of Elgin, Union County, Oregon, do hereby appoint Wm. Miller & Bro., of La Grande, Oregon, my

agents to procure for me a loan of fifty-five hundred dollars for the term of five years, with the privilege of paying \$1,000 per year, or the whole amount in three years, at the rate of 8 per cent per annum, said interest to be paid annually; said loan to be secured by first mortgage upon the following described real estate: * * 198 acres. And I hereby agree to pay to said Wm. Miller & Bro. the sum of two hundred and twenty dollars for their services in procuring said loan, and for examining said described property and the title thereto, and for making out the necessary papers, documents, and mortgage; said two hundred and twenty dollars to be payable on demand, and when so paid by me to be payment in full for all services rendered to me in said matter by said Wm. Miller & Bro. And I hereby authorize the said Wm. Miller & Bro. to procure at my expense an abstract of title to said property, and have the same passed upon by their attorney at law, and if upon examination the title to said property is found to be unsatisfactory to said attorney at law, or for any other reason I am unable or unwilling to consummate said loan, I agree to pay to said Wm. Miller & Bro. the sum of two hundred and twenty dollars to compensate them for services rendered in said negotiations; the last-named amount to be paid by me in lieu of said first-named amount.

“Dated at La Grande, Oregon, this 1st day of November, 1912.

“J. R. WEAVER.”

The defendant on December 19, 1912, executed to Mrs. Rachel C. McKinnis a mortgage of his farm, and obtained from her money with which the prior mortgages were discharged.

The complaint alleges, in substance, that the plaintiffs, William Miller and A. C. Miller, at all the times stated were and are partners as Wm. Miller & Bro.; that in consideration of the acceptance of such agency the defendant made, executed and delivered to them

the writing mentioned; that they promptly procured for him the loan solicited, examined his farm, accepted the security offered as adequate for the money desired, and performed all the terms specified, except such as were excused by the defendant's refusal to keep his engagement, and they have been at all times ready, able and willing to consummate the loan, but the defendant failed to perform his part, whereby they are entitled to \$220 for which sum judgment is demanded.

The answer admits the signing of the writing, but denies all other averments of the complaint. For a further defense it is alleged, in effect, that the defendant subscribed his name to the instrument pursuant to negotiations to obtain a loan upon his farm upon which H. Towner held a mortgage; that unless such encumbrance was canceled a first lien could not be given; that it was agreed the defendant should write Towner and ascertain if a release could be secured upon payment of a part of the mortgage debt, and the written instrument was to become effective only upon his consent to that proposition, without which assent it was agreed the writing was to be void; that defendant immediately wrote such mortgagee, who, replying, refused to release his lien, of which fact the plaintiffs were promptly notified. A motion to make the answer more definite by averring whether or not the alleged agreement whereby the instrument remained inoperative was in writing was denied. A demurrer to the new matter in the answer on the ground that such averments did not constitute a defense was overruled, whereupon a reply was filed controverting the allegations of such new matter. Based on these issues, the cause was tried, resulting in a verdict and judgment for the defendant, and the plaintiffs appeal.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Charles A. Small*.

There was no brief or appearance for the respondent in this court.

Opinion by MR. CHIEF JUSTICE MOORE.

It is contended that errors were committed in denying the motion and in overruling the demurrer. It is also insisted that the court erred in receiving, over objection and exception, certain testimony, and in giving and refusing instructions, to which rulings exceptions were taken. These alleged assignments may all be considered under some of the instructions referred to. Thus the plaintiffs' counsel requested the court to charge as follows:

"Gentlemen of the jury, I instruct you that, if you find that defendant delivered to plaintiffs the instrument signed by the defendant, a copy of which is annexed to plaintiffs' complaint, and refused to comply with the terms thereof, and if plaintiffs performed their part of the agreement, you will find for the plaintiffs."

This language was given, with the following addition:

"Unless you find that plaintiffs and defendant entered into the oral agreement hereafter referred to."

Without request the jury were further charged as follows:

"I instruct you that, if you believe there was a parol agreement between the plaintiffs and the defendant that the written instrument introduced in evidence, signed by the defendant, was not to become effective as a contract between plaintiffs and defendant unless one H. Towner should give his consent to defendant giving first mortgage security to plaintiffs as security

for a loan to be procured from plaintiffs, the said H. Towner agreeing to accept partial payment of the moneys due him, and take a second mortgage for the balance, and that Towner refused such consent, then you shall find for the defendant."

No brief has been filed by the defendant, nor did he appear in any manner in this court. It appears from an examination of a transcript of the testimony that the cause was tried upon the issue as to whether or not the writing was delivered. This theory is evidenced by the requested instruction hereinbefore quoted. The plaintiffs' counsel, referring to the written instrument, inquired of his client, William Miller:

"Did Mr. Weaver hand it over to you?"

The witness answered:

"I don't know that he handed it to me; it was signed on the desk in my presence; was picked up off the desk by me and folded and put away."

No testimony was offered tending to show that the writing, after it was signed, was left upon the desk or elsewhere by the defendant with the intention that it should be taken by the plaintiffs, so as to have irrevocably passed beyond his control: *Allen v. Ayer*, 26 Or. 589 (39 Pac. 1); *Hoffmire v. Martin*, 29 Or. 240 (45 Pac. 754); *Payne v. Hallgarth*, 33 Or. 430 (54 Pac. 162). The plaintiffs' possession of the instrument would undoubtedly have raised a disputable presumption, in the absence of any other evidence, that the writing had been duly delivered: *Flint v. Phipps*, 16 Or. 437 (19 Pac. 543); *Swank v. Swank*, 37 Or. 439 (61 Pac. 846); *Pierson v. Fisher*, 48 Or. 223 (85 Pac. 621); *State v. Leonard*, 73 Or. 451 (144 Pac. 113, 681).

Though the grantee's possession of a deed, duly executed, affords *prima facie* evidence of its delivery,

thereby imposing upon the grantor the burden of disproving an intentional surrender of the sealed instrument, parol evidence is admissible to rebut such presumption by showing that the writing was never delivered: Devlin, Deeds, §§ 294, 295. Instead of relying upon the deduction which the law expressly directs to be made from the mere possession of the writing, the plaintiffs' counsel, as it will be remembered, undertook to supplement the presumption by interrogating his client in respect to the manner in which he secured custody of the instrument, without attempting to prove its legal delivery or to show any facts from which a valid possession of the writing could reasonably have been inferred. By this means the *prima facie* evidence of a delivery was overthrown, and, as there was no other testimony offered upon this subject, the material issue that the defendant "made, executed and delivered to said plaintiffs an instrument in writing" as alleged in the complaint and denied by the answer was not established in the plaintiffs' favor. If William Miller had testified that the defendant, after signing the writing, left it on the desk for the witness, delivery could have been inferred. In order to supplement the presumption adverted to, it must be inferred, from the testimony so quoted, that the writing was left on the desk for the witness, and from such deduction an intention to deliver must also be inferred. This would be founding an inference on an inference, which mode of proof is prohibited: Sections 794, 796, L. O. L.; *State v. Hembree*, 54 Or. 463 (103 Pac. 1008); *State v. Lem Woon*, 57 Or. 482 (107 Pac. 974, 112 Pac. 427); *Lintner v. Wiles*, 70 Or. 362 (141 Pac. 871). It will thus be seen that such presumption was destroyed by the additional testimony. The verdict and judgment may securely rest upon the plaintiffs' failure to prove

a material averment, which disputed fact it was incumbent upon them to establish.

The requested instruction was predicated upon the hypothesis of a delivery of the writing, and the language so employed should have been given without the added clause mentioned. If it can be assumed from the part of the quoted charge given by the court of its own motion that the instrument was in fact delivered, it would necessarily follow that the written obligation became absolute. Such being the case, the extrinsic parol agreement alleged in the answer, providing for a qualification of the writing, was a condition subsequent which did not constitute a defense to the action, and errors were committed as alleged: Section 713, L. O. L.; Wigmore, Ev., § 2435, note 3. But, however this may be, as the certificate of the trial judge shows that there were attached and made a part of the bill of exceptions copies of the entire testimony, the instructions to the jury, exhibits and all other material matters, a careful consideration thereof leads to the conclusion that substantial justice has been administered, notwithstanding any supposed errors: *Hoag v. Washington-Oregon Corp.*, 75 Or. 588 (147 Pac. 756).

It follows that the judgment should be affirmed; and it is so ordered. AFFIRMED. REHEARING DENIED.

MR. JUSTICE BEAN concurs.

MR. JUSTICE BENSON and MR. JUSTICE MCBRIDE concur in the result.

MR. JUSTICE BURNETT delivered the following dissenting opinion.

1. In substance, the plaintiffs allege that about November 1, 1912, the defendant executed and delivered

to them an agreement in writing to the effect that he would pay them \$220 on demand if they would procure for him a loan of \$5,500 for five years to be secured by a first mortgage upon his land, and that, if upon examination of title to the realty it was found to be unsatisfactory, or if for any other reason the defendant was unable or unwilling to consummate the loan, he would pay plaintiffs the stipulated fee. They further aver performance of the things to be done by them under the contract so far as they could be accomplished but for the refusal of the defendant to do his part, and demand judgment for \$220. The answer "denies each and every material allegation in said complaint contained, except admits the signing of the instrument attached to and made a part of plaintiffs' complaint." The defendant's pleading then contains this affirmative statement:

"Defendant alleges that the instrument in plaintiffs' complaint mentioned, designated a contract, was signed by defendant in pursuance of negotiations then and there had between them, whereby defendant applied to plaintiffs for a loan of \$5,500, offering as security therefor his farm of about 198 acres situated near Elgin, Union County, Oregon, upon which a mortgage obtained in favor of one H. Towner, and without the release of which defendant was unable to give plaintiffs first mortgage security.

"That thereupon the parties hereto agreed defendant should write said H. Towner and ascertain if he would consent to release his mortgage, and defendant signed said instrument in pursuance of an agreement then and there had between them that the same was to become effective conditioned upon consent as afore-said being obtained from said H. Towner; otherwise to be and remain void and of no effect.

"That immediately thereafter defendant communicated with said H. Towner, who refused to release his

mortgage as aforesaid, all of which defendant immediately communicated to plaintiffs."

A general demurrer to the new matter in the answer was overruled, and the reply traversed it. A jury trial resulted in a verdict and judgment for the defendant, from which the plaintiffs appeal.

It will be noted that the defendant says he signed the instrument upon which the plaintiffs base their action "in pursuance of an agreement then and there had between them that the same was to become effective conditioned upon consent as aforesaid being obtained from said H. Towner; otherwise to be and remain void and of no effect." This new matter does not question the delivery of the instrument. It is an attempt to ingraft upon it a conditional defeasance. The Standard Dictionary defines the word "pursuance" as:

"The act of pursuing; a following after or following out; prosecution; usually in the phrase 'in pursuance of.'"

As applicable to the instant case, it refers to something prior to or concurrent with the execution of the document in question. According to the answer, this proposed defeasance was agreed upon before the signing of the contract upon which the plaintiffs declare. The writing is plain and explicit. There are no ambiguities in the instrument, either apparent or latent. In *Ruckman v. Imbler Lumber Co.*, 42 Or. 231 (70 Pac. 811), the parties had executed a written memorial of their stipulation, and afterward, in defense of an action at law upon the same, the defendant resisted the plaintiff's demand by alleging a contemporaneous parol agreement that the latter would discharge certain liens on the property involved. Mr. Chief Justice MOORE, writing the opinion, said:

“The rule is universal that, as between the parties and their representatives and successors in interest, except where an alleged mistake is controverted by the pleadings, or in case the validity of the contract is the fact in dispute, parol contemporaneous evidence is inadmissible to vary or contradict the terms of a written agreement. * * Plaintiff having never stipulated to discharge the liens upon the engine and boiler, there was no ambiguity in the agreement quoted, and the averment in the answer that there was a parol agreement to the contrary was demurrable, and, though issue was joined thereon, it could not be established by parol testimony, and no error was committed in refusing to permit the witness to answer the question propounded to him.”

On the demurrer to the answer in this case the precedent just quoted is controlling; for it is manifest from the language of the plea that it is an attempt to incorporate into the contract an additional stipulation contrary to the terms thereof. It is not a case where part of the agreement is in writing and part in parol. In the *American Contract Co. v. Bullen Bridge Co.*, 29 Or. 549 (46 Pac. 138), Mr. Chief Justice MOORE quotes with approval the following language from *West v. Kelly's Exrs.*, 19 Ala. 353 (54 Am. Dec. 192):

“If the instrument is perfect and complete—that is, if it contains the entire contract—then the rule is inflexible that parol evidence cannot be received to add another term to the written instrument, or to change its legal effect. * * But, if it be apparent that the instrument in writing contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract; otherwise the contract could not be brought before the court. * * But the parts of the agreement proposed to be proved by parol must not be inconsistent with or repugnant to the intention of the parties, as shown by the written instrument; for, to receive parol proof of a part

not reduced to writing, which is directly repugnant to the intention of the parties, as expressed in the written instrument, would at once annul the rule that parol evidence cannot be received to contradict or vary the terms of a written agreement."

As throwing light on the question in the instant case, we quote from the testimony. While the defendant was on the stand as witness on his own behalf counsel for plaintiff asked him this question:

"Mr. Weaver, was that agreement you mention that you would borrow the money from Mr. Miller if Mr. Towner would take a second mortgage, was that in writing?"

"A. No, sir. I did not sign this agreement until Mr. Miller agreed not to have this in effect unless Mr. Towner did agree to it.

The law is thus stated in Section 713, L. O. L.:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud."

We remember that this is an action at law. The defendant does not attempt by cross-bill in equity or otherwise to allege a mistake or imperfection in the writing. On the contrary, he explicitly avows the signing of the instrument involved. Neither does he aver any act of fraud on the part of the plaintiffs by which

he was induced to execute the stipulation. In *Portland National Bank v. Scott*, 20 Or. 421 (26 Pac. 276), it was held that in an action upon promissory notes, where no illegality or fraud is charged, it is not competent to allege or prove a contemporaneous parol agreement for the purpose of changing, varying or in any manner altering the legal effect of such notes. The defendant there essayed to escape liability by pleading an oral contract said to have been entered into at the time of the execution of the notes between the plaintiff and the defendant to the effect that the former should look to a certain railway company for payment; it having received the entire consideration upon which the notes were made. In *Hindman v. Edgar*, 24 Or. 581 (17 Pac. 862), which was an action to recover upon a promissory note and for money due upon a written lease, the defendant resisted the claim on the ground that at the time of executing the lease the parties made a verbal contract to the effect that, if the defendant had certain goods on hand at the expiration of the term, the plaintiff would take them back at an agreed price. The court held that this was not admissible, and that it was error to instruct the jury that the terms of the written contract could be affected or varied by a contemporaneous verbal agreement between the parties. In *Wilson v. Wilson*, 26 Or. 251 (38 Pac. 185), Mr. Justice WOLVERTON wrote to the effect that, where a promissory note was given for a definite sum and made payable on a day certain, it cannot be shown by verbal testimony that it was intended merely as a memorandum, and was not to be paid until the amount thereof could be realized out of a certain business venture. In *Edgar v. Golden*, 36 Or. 448 (60 Pac. 2), a suit to foreclose a mortgage, it was urged in defense that the moneys secured were

not to become due nor the mortgage foreclosed until it had been established in an appropriate suit or proceeding that the plaintiff had good and unimpeachable title to the premises. Mr. Justice WOLVERTON reviewed the authorities, and said:

“The mortgage must be presumed to contain all the terms of the contract entered into at the time of its execution, and we must look to it and the notes copied therein to determine the time of the payment, and thus ascertain when the mortgage is subject to foreclosure. The parol agreement, if any, made and entered into prior to or at the time of the execution of such mortgage, cannot be relied upon or used to contradict or vary the terms of such notes and mortgage for the purpose of ascertaining the date of their payment or the time within which such mortgage is subject to foreclosure. So we hold that the evidence offered was incompetent for the purposes for which it was intended; that the notes were due and the mortgage enforceable at the time of the commencement of the suit; and that such parol agreement cannot be used as a hindrance to the prosecution of the suit for the foreclosure of the mortgage.”

In *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135), the effort of the defendant was to prove that a certain contract which he set out was intended to be given in full satisfaction of the claim and mortgage mentioned in the complaint; that the written agreement given in the answer was so accepted by the plaintiff, and that, as a consideration additional to the one stated in the written instrument for its execution, the plaintiff agreed to dismiss the foreclosure suit. Mr. Commissioner KING, after stating the ordinary rule against the admission of parol evidence either to contradict, add to, detract from or vary the terms of a written instrument, used this language:

“But it is argued that it is always permissible to show by parol other and additional consideration than that specified in the contract, and that the averments are sufficient for that purpose; and this position is tenable where a monetary consideration is specified: *Burkhart v. Hart*, 36 Or. 586 (60 Pac. 205). But in the case before us the consideration specified in the written contract consists of certain acts to be performed, and the authorities are * * unanimous in holding that, where the statement in the written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence. A party has a right to make the consideration of his agreement of the essence of the contract, and, when this is done, the consideration for the contract, with reference to its conclusiveness, must stand upon the same footing as its other provisions, and accordingly cannot be affected by the introduction of parol or extrinsic evidence”—citing authorities.

See, also, *Tallmadge v. Hooper*, 37 Or. 503 (61 Pac. 349, 1127); *Stoddard v. Nelson*, 17 Or. 417 (21 Pac. 456); *Marx v. Schwartz*, 14 Or. 177 (12 Pac. 253); *Weidert v. State Ins. Co.*, 19 Or. 261 (24 Pac. 242, 20 Am. St. Rep. 809); *Williams v. Mt. Hood Ry. Co.*, 57 Or. 251 (110 Pac. 490, 111 Pac. 17, Ann. Cas. 1913A, 177); *Gill v. Columbia Contract Co.*, 70 Or. 278 (141 Pac. 163).

It will be observed that the language of the answer is that the defendant “denies each and every material allegation in said complaint contained.” We may well doubt if this constitutes a denial or amounts to more than the traverse of a legal conclusion: *Montour v. Purdy*, 11 Minn. 384 [Gil. 278] (88 Am. Dec. 88); *Dodge v. Chandler*, 13 Minn. 114 [Gil. 105]; *Pry v. Hannibal etc. Ry. Co.*, 73 Mo. 123; *Edmonson v. Phillips*, 73 Mo.

57; *Moody v. Belden*, 60 Hun, 582 (15 N. Y. Supp. 119); *Lewis v. Coulter*, 10 Ohio St. 451; *Mead v. Pettigrew*, 11 S. D. 529 (78 N. W. 945); *Kimball v. Stanton* (C. C.), 4 Fed. 325; *New York Coach & Auto Lamp Co. v. Brown*, 82 Misc. Rep. 92 (143 N. Y. Supp. 100). The reasons urged against that form of controverting an allegation are that it is for the court, and not the pleader, to determine what are material averments, and that it would be impossible to assign perjury upon the verification of such an answer, because the affiant reserves to himself the determination of what is material, and hence within the purview of his affidavit. In a long course of decisions we have continually held that no issue is raised by the allegation of a legal conclusion, and it is not apparent why the denial of one should not be attended by the same result.

Passing this question, however, it is not contended in the testimony for the defendant that the writing was not delivered. He makes no pretense but that he voluntarily parted with the custody of the writing which he had signed, and left it with the plaintiffs. If the answer challenges the delivery of the instrument, it does so by the merest technicality, but that question is not raised in the testimony. The supreme effort of the defendant was to incorporate in the written agreement a nullifying contemporaneous parol condition. The instrument in question was found in the possession of the plaintiff, from which we presume, under Subdivision 11 of Section 799, L. O. L., "that things in the possession of a person are owned by him," and that the writing had been regularly delivered to the plaintiffs upon its execution by the defendant. It is true that their counsel asked the witness Wm. Miller, one of the plaintiffs:

"Did Mr. Weaver hand it over to you?"

And he answered:

"I don't know that he handed it to me; it was signed on the desk in my presence; was picked up off the desk by me and folded and put away."

There is nothing in that testimony, however, which would authorize us, as a matter of law, to say that it contradicts a delivery or overcomes the presumption of delivery arising from the possession of the instrument by the party who relies upon it. To hold to the contrary would make it indispensable that in every transaction involving the delivery of an instrument the party executing the same actually should take it into his hands and pass it into the manual custody of the opposite party. This would be a strained and unwarrantable construction to be placed upon any business affair. Neither does the testimony of Miller, quoted above, fall short of tending to prove delivery, because he says nothing about Weaver's intent in the occurrence described. A person may sometimes state his own intent; but no witness can declare the mental purpose which actuates another. The jury alone must determine that from the evidence of acts and statements of the one whose intent is in question.

The plaintiffs requested the court to instruct the jury thus:

"I instruct you that, if you find that defendant delivered to plaintiffs the instrument signed by the defendant, a copy of which is annexed to plaintiffs' complaint, and refused to comply with the terms thereof, and if plaintiffs performed their part of the agreement, you shall find for the plaintiff."

The court, however, modified the request by annexing to it this language, "unless you find that plaintiffs and defendant entered into the oral agreement hereafter referred to," alluding to the agreement re-

lied upon by the defendant in his answer. The modification of this instruction is clearly prohibited by the authorities already quoted, and the plaintiffs had a right to have their theory of the case submitted to the jury without the change noted. The evidence strongly tends to show a delivery of the instrument; in fact, there is nothing in the testimony whatever to dispute that proposition, and the plaintiffs were entitled to go to the jury on the question. Above all, this is not a case where the court should arbitrarily disregard the rules of law announced by the well-considered decisions heretofore rendered by this court, and capriciously say that the verdict for the defendant was right notwithstanding any errors committed by the trial court. There is ample evidence to the effect that the plaintiffs did everything they could in the performance of their contract, and that the defendant refused to perform his part because he found a place where he could borrow the money without paying a broker's fee. It may have been improvident of him to make the agreement in question, but, if he made it and violated it, he should respond to the plaintiffs according to his stipulation. The bill of exceptions discloses a case analogous to instances where a real estate broker employed to find a purchaser brings to the seller a buyer, ready, able and willing to purchase on the terms specified. It has been universally held that in such cases the broker earns his fee, although his employer refuses to continue the transaction and effect the sale.

The judgment should be reversed and the cause remanded for a new trial.

MR. JUSTICE HARRIS concurs in this dissent.

Argued December 3, reversed and decree rendered December 21, 1915.
Rehearing denied January 18, 1916.

CAMPBELL'S GAS BURNER CO v. HAMMER.*

(153 Pac. 475.)

Judgment—When Conclusive Only as to Matters Actually Litigated— *Res Judicata*.

1. The rule of *res judicata* allows to each party a day in court, and requires that all matters of a judicial controversy shall be determined in the same suit or action, if they can be legally joined, and an opportunity is offered to plead them, and it follows that a final judgment or decree bars all subsequent proceedings upon the same cause of suit or action and of every other matter that might have been decided, relating either to the cause of action or matter of defense, but if founded upon a different cause of action or ground of defense, the prior judgment or decree is an estoppel only as to the matters actually litigated.

Joint Adventures—Fiduciary Relation Equivalent to a Partnership Created.

2. Where sole agents were authorized by a gas company to dispose of its corporate stock by their united efforts, such disposal of the capital stock created a fiduciary relation tantamount to a partnership, and in the absence of a showing it will be presumed that the parties thus engaged shared equally the profits and losses pertaining to the business.

Equity—Jurisdiction Over Trusts.

3. Courts of equity have jurisdiction over all trusts for the purpose of compelling an accounting and settlement, and the existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction whenever the duty rests upon one party to render an account to the other, and in the absence of statute, equity has exclusive jurisdiction for the dissolution and settlement of partnerships.

Equity—Remedy at Law must be Full, Adequate and Efficient to Defeat Suit.

4. In order to defeat the jurisdiction of a court of equity, the remedy at law must be as full, adequate, complete and as efficient as the equity court.

Judgments—Matters Concluded.

5. From the agreed statement of facts filed in this suit it appears that the corporation appointed four persons as sole agents to sell and

*On dismissal of suit to defeat attorney's lien or claim to compensation, see note in 5 L. E. A. (N. S.) 390.

On power of court to protect attorney who has taken case on contingent fee against voluntary dismissal by client without his consent, see note in 14 L. E. A. (N. S.) 1095.

The rights and remedies of attorney whose client compromises causes of action without his consent before action brought are discussed in note in 45 L. E. A. (N. S.) 750.

dispose of the corporate stock, who were to receive as their commissions all sums obtained for said stock in excess of \$7 a share. After the agents had sold the stock and the corporation became liable for the commissions, three of them disposed of their claims and assigned same to other parties, while the other was adjudicated a bankrupt. The assignees of the claims for commissions entered into a contract with an attorney agreeing to allow him 30 per cent of the amount recovered. Prior to the hearing and trial of the suit of the attorney against the corporation, two of the claimants compromised and executed releases to the corporation for the amount of their claims. *Held* that after the compromise and settlement was made by the corporation with the two agents, the defendant in the law action was not obliged to allege in its answer the fact of such assignments, and its failure so to do will not bar a subsequent suit to enjoin an execution in the interest of one claiming a percentage of the judgment on the causes of action assigned.

Attorney and Client—Right of Client to Compromise Prior to Judgment.

6. An attorney has no lien for his services prior to the entry of judgment or decree, and in the absence of fraud, a compromise made by the client before judgment or decree without the attorney's consent will be upheld. (Citing *Stearns v. Wollenberg*, 51 Or. 88, 92 [92 Pac. 1079, 1080, 14 L. R. A. (N. S.) 1095].)

[As to compromise, settlement and discharge by attorney, see note in 132 Am. St. Rep. 163.]

From Multnomah: ROBERT G. MORROW, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Campbell's Automatic Safety Gas Burner Company, a corporation, against Bertha E. Hammer, Harry G. Mourer, Jesse C. Luker, A. A. Cunningham, as trustee of Henry G. Sonnemann et al., bankrupts, John B. Coffey, County Clerk, T. M. Hurlburt, Sheriff, and Robert J. Upton, to enjoin the issuing of an execution, to restrain a levy thereunder, and to compel the cancellation of a judgment. The cause, being at issue, was tried upon a stipulation of facts to the effect: That on October 26, 1909, a written contract was signed by the plaintiff, a corporation, which for brevity will be called the gas company, and Henry G. Sonnemann, George C. Mourer, George R. Baker and George W. Morgan, whereby the gas company stipulated to issue, sell, and deliver to them

6,000 shares of its capital stock for \$42,000. That this contract was subsequently modified by an oral agreement, by the terms of which the persons named were appointed sole agents of the gas company to sell its stock, and were to receive as their commissions all sums obtained therefor in excess of \$7 a share. That Baker and Morgan with the consent of all the parties, transferred their respective interests in the contract to L. C. Hammer and H. G. Luker. That the two latter, Sonnemann and Mourer, sold 6,033 shares of stock at \$10 a share, and turned over \$60,330 in money and promissory notes, which instruments were received as cash by the gas company, which agreed to pay the commission at the maturity of the notes, but not conditioned upon their payment. That Hammer, Mourer and Luker each assigned his individual interest in the commissions so earned to the defendants Bertha E. Hammer, Harry G. Mourer and Jesse C. Luker, respectively, of which transfers the gas company was notified. That by consideration of the District Court of the United States for the District of Oregon, H. G. Sonnemann and others were adjudicated bankrupts, and the defendant A. A. Cunningham was elected trustee of their estates, and duly qualified for the trust. That the gas company paid all the commissions so earned, except \$6,873.43, to collect which the persons entitled thereto entered into a contract with the defendant Robert J. Upton, an attorney, stipulating to pay him 30 per cent of all sums of money that he might recover on account thereof. That he commenced an action in February, 1912, in the Circuit Court of the State of Oregon for Multnomah County, on behalf of Bertha E. Hammer and others against the gas company, to recover the remainder of the commissions. That before an answer

was filed in that action Harry G. Mourer, one of the plaintiffs therein, in consideration of \$500, settled with the gas company, representing to it that his attorney was a Mr. Blatchley, who was in Southern Oregon and did not expect to return, upon which statement the gas company relied, overlooking the fact that Mr. Upton was the attorney of record of all the adverse parties. That this latter attorney thereupon notified the gas company that he represented all the plaintiffs in that action, and that settlements with such clients should be made with him. That upon receiving such notice the gas company wrote Jesse C. Luker, with whom it had been negotiating, informing him of the notice so given, and received from him a letter, stating that Mr. Upton was not his attorney, but he believed his father, H. G. Luker, had employed Mr. Upton in the transaction of some business not connected with or relating to the commissions. That relying upon the statements contained in the letter, the gas company settled with Jesse C. Luker for the sum of \$250. That neither Harry G. Mourer nor Jesse C. Luker has any property that is subject to execution. That after these settlements were made the gas company filed its answer in the action against it, but made no mention of the compromises which had been made with Mourer and Luker. That the action referred to was tried, and judgment rendered for the remainder of the commissions, or \$6,873.43, against the gas company, which appealed therefrom, whereupon the judgment was modified as to the date from which the interest was to be computed, but in all other respects affirmed: *Hammer v. Campbell's Gas Burner Co.*, 74 Or. 126 (144 Pac. 396). That the mandate having been entered in the lower court, the gas company paid to the clerk of that court, for Bertha E. Hammer

and A. A. Cunningham, trustee, one half of the judgment and interest, and all the costs and disbursements, and thereupon requested Mr. Upton, who had received the money for his clients, to cancel the judgment, but he refused to comply therewith. That if the court should find Mr. Upton entitled to recover from the gas company the entire amount of his attorney's fee due from Harry G. Mourer and Jesse C. Luker, he should be awarded 30 per cent of one half of the judgment referred to; if, however, he should be found to be entitled to recover on Luker's account only, he should receive 30 per cent of five sixths of that part of the judgment; and if on Mourer's account only, he should be given 30 per cent of one sixth of that portion thereof.

Predicated upon this agreed statement of facts, the defendants' counsel moved to dismiss the suit on the grounds: (1) That there is no equity in the bill; (2) that the complaint does not state facts sufficient to constitute a cause of suit; (3) that no existence of a partnership or joint venture on the part of the defendants is alleged; (4) that no unsettled accounts are averred to subsist; (5) that no reason for an accounting is stated; and (6) that the prayer of the complaint does not seek any settlement of accounts. This motion was sustained, the suit dismissed and the plaintiff appeals.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the name of *Messrs. Jenkins & Crawford*, with an oral argument by *Mr. John C. Jenkins*.

For respondents there was a brief submitted over the names of *Mr. Robert J. Upton*, *Mr. Lisle A. Smith* and *Mr. James N. Davis*, with an oral argument by *Mr. Upton*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The important question to be considered is whether or not the failure of the gas company to allege in its answer, in the law action to recover commissions, the settlements made with Harry G. Mourer and Jesse C. Luker, which compromises were consummated before that plea was interposed, precludes the gas company from maintaining this suit. The rule of *res judicata*, which was designed to promote the peace of society, allows to each party a day in court, and demands that in the trial of issues between the same parties all matters of judicial controversy shall be settled and determined in the same suit or action, if such causes can legally be joined and an opportunity is afforded to plead them. As a corollary deducible from this legal principle, it follows that if a final judgment is rendered, or a decree given on the merits, it is conclusive as to the rights of the parties and bars all subsequent legal proceedings between them upon the same cause of action or suit, not only as to the issues actually adjudicated, but also as to every other matter that might have been put forth and decided as relating thereto or necessarily associated therewith, either as a cause of action or a ground of defense. When, however, the cause of suit or action or the ground of defense therein is founded upon a different claim or demand, the former judgment or decree constitutes an estoppel only as against matters actually litigated: *Barrett v. Failing*, 8 Or. 152; *Applegate v. Dowell*, 15 Or. 513, 516 (16 Pac. 651); *La Follett v. Mitchell*, 42 Or. 465 (69 Pac. 916, 95 Am. St. Rep. 780); *Neil v. Tolman*, 12 Or. 269 (7 Pac. 103); *Morrill v. Morrill*, 20 Or. 96 (25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155); *Belle v. Brown*, 37 Or. 588 (61 Pac. 1024); *White*

v. *Ladd*, 41 Or. 324 (68 Pac. 739, 93 Am. St. Rep. 732); *Ruckman v. Union Ry. Co.*, 45 Or. 578 (78 Pac. 748, 69 L. R. A. 480); *Yuen Suey v. Fleshman*, 65 Or. 606 (133 Pac. 803, Ann. Cas. 1915A, 1072); *Colgan v. Farmers & Mechanics' Bank*, 69 Or. 357 (138 Pac. 1070).

2. The persons appointed sole agents by the gas company to sell its stock may not have formed a partnership, but their united efforts to effect such disposal of the principal fund of the corporation made each a participant in a joint venture which, as between them, created a fiduciary relation tantamount to a partnership. In the absence of any showing to the contrary, it must be presumed that each party engaged therein had an equal interest in the enterprise, was compelled to bear a ratable part of the burdens imposed and the losses sustained, and permitted to share an equitable part of the profits derived from pursuing the business: 22 Am. & Eng. Ency. Law (2 ed.), 101; 23 Cyc. 459; *Gius v. Coffinberry*, 39 Or. 414 (65 Pac. 358); *Eilers Music House v. Reine*, 65 Or. 598 (133 Pac. 788). All the commissions having been earned before any interests therein were assigned to Harry G. Mourer or Jesse C. Luker, the joint venture had thus terminated, and each succeeded to all the rights and became subject to all the burdens resting upon his assignor.

3. It is fairly to be inferred from the agreed statement of facts, hereinbefore referred to, that if no settlement or compromise had been made, Jesse C. Luker would have been entitled to five twelfths and Harry G. Mourer to one twelfth of the amount of the judgment rendered against the gas company. This stipulation of facts rebuts the presumption of an equal

interest of their assignors in the commissions so earned.

"Courts of equity," says an author, "have jurisdiction over all trusts for the purpose of compelling an accounting, and the existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction whenever the duty arising out of such relation rests upon one of the parties to render an account to the other": 1 C. J. 621.

Another text-writer, discussing this matter, observes:

"In the absence of statutory provisions on the subject, a court of equity has exclusive jurisdiction of actions for the dissolution and settlement of partnerships": 30 Cyc. 716

4. The remedy at law which will defeat the maintenance of a suit in equity must be as full, adequate, complete and efficient as is the means by which the violation of a right is prevented, redressed or compensated in the latter forum: *South Portland Land Co. v. Munger*, 36 Or. 457 (54 Pac. 815, 60 Pac. 5); *Benson v. Keller*, 37 Or. 120 (60 Pac. 918); *Wollenberg v. Rose*, 41 Or. 314 (68 Pac. 804); *Hall v. Dunn*, 52 Or. 475 (97 Pac. 811, 25 L. R. A. (N. S.) 193); *Dose v. Beatie*, 62 Or. 308 (123 Pac. 383, 125 Pac. 277).

5. The relation existing between the persons jointly engaged in selling the corporate stock being fiduciary and in the nature of a partnership, the dissolution of which, and the settlement of the accounts thereof, could be secured only in a court of equity, the gas company was not obliged to allege in its answer in the law action the fact of the assignments which it had secured. It is possible that after interposing an answer in that action the gas company, as plaintiff,

could have filed a cross-bill in equity and set forth such assignments, and thereby secured a stay in the prosecution of the action until the suit was finally determined: Section 390, L. O. L. It was not essential, however, that such a course of practice should have been pursued, for a party may safely rely upon a legal defense in an action without being precluded from asserting his equitable right in an original suit: *Hill v. Cooper*, 6 Or. 181; *Starr v. Stark*, 7 Or. 500; *Spaur v. McBee*, 19 Or. 76 (23 Pac. 818); *McMahan v. Whelan*, 44 Or. 402 (75 Pac. 715); *Fire Association v. Allesina*, 45 Or. 154 (77 Pac. 123); *Clark v. Hindman*, 46 Or. 67 (79 Pac. 56); *Bowsman v. Anderson*, 62 Or. 431 (123 Pac. 1092, 125 Pac. 270).

We consider, therefore, that the answer of the gas company in the action against it to recover commissions did not bar the maintenance of this suit. The stipulation of facts seems to concede that the only question involved in this suit is the right of the attorney to recover his stipulated compensation with respect to the claims so assigned, notwithstanding their transfer.

6. An attorney has no lien for his services before judgment or decree, and until such final determination of the cause has been made, the client may compromise the case without reference to any contract with the attorney: *Jackson v. Stearns*, 48 Or. 25 (84 Pac. 798, 5 L. R. A. (N. S.) 390). In *Stearns v. Wollenberg*, 51 Or. 88, 92 (92 Pac. 1079, 1080, 14 L. R. A. (N. S.) 1095), in discussing this subject, it is said:

“It would appear, therefore, that, where there is no lien upon the cause of action, either by contract or by statute, the plaintiff’s attorney has no vested right which the court is bound to protect at the request of the attorney; but even then the court may, in its discretion, exercise such arbitrary power, and

doubtless will do so, when it can see that, through the exercise of the usual and ordinary powers vested in a court over its judgment as to the form and effect thereof, or as to its satisfaction, it may aid the attorney in the collection of his fees."

The authority of a court thus to protect an attorney from an act of his client in assigning or compromising a cause of suit or action must necessarily depend upon the client's fraud, which, to become available as a ground of relief, must have been knowingly participated in by the adverse party who secured the transfer or settlement of the demand. An examination of the agreed statement of facts upon this subject, as hereinbefore detailed, fails to show any fraudulent acts or conduct which would warrant a court of equity in imposing upon the gas company any part of Mr. Upton's fees predicated upon the assignments so made. The decree will therefore be reversed, and one entered here granting the relief prayed for in the complaint. REVERSED. DECREE RENDERED.

Argued December 2 and December 14, affirmed December 21, 1915.
Rehearing denied January 18, 1916.

RICHARDS v. DISTRICT SCHOOL BOARD.*

(153 Pac. 482.)

Statutes—Schools—Removal of Teachers.

1. All the provisions of a statute must be given effect if possible, under a reasonable construction; for example, Section 1 of Laws of 1913, Chapter 37, page 69, gives the board of directors of every school district the power to remove and discharge all teachers as it may deem necessary; Section 4 provides that teachers employed in a district as regularly appointed teachers for not less than two successive years shall be placed upon the list of permanently employed teachers; Section 5 that such teachers shall serve until dismissed, subject to the board's rules which shall be reasonable; Section 6 that before dismissal, any teacher on the permanent list shall receive written

*On *mandamus* to compel the reinstatement of a teacher, see note in 49 L. E. A. (N. S.) 62.

REPORTER.

notice stating the cause, a copy of any charges filed, and, on request, shall be entitled to a hearing before the board; and Section 11 repealed all acts in conflict therewith. These sections must all be read with reference to each other, and mean that the school board has the power to dispense with the services of all teachers, but must proceed in the manner pointed out by the statute—it has no power to remove without a hearing, and for an arbitrary or capricious reason.

Schools and School Districts—Removal of Teacher.

2. Laws of 1913, Chapter 37, page 69, providing for the employment of school teachers, for the creation of a permanent list of teachers, and for their removal after written notice and a hearing, taken in connection with Laws of 1913, Chapter 172, pages 299, 304, Section 1, subdivision 22, authorizing school boards to dismiss teachers only for good cause, limit the power of dismissal to reasonable causes.

Power of School Boards to Enlarge Statutory Contract.

3. A school board has not authority to add to a teacher's contract of employment provisions as to the term or conditions of service beyond those found in the statutes defining the powers of the board.

Schools—Marriage as Reason for Dismissing Teacher.

4. The dismissal of a teacher because of becoming married is an arbitrary and capricious act, in violation of a statute giving school boards the right to dismiss teachers for reasonable cause.

Mandamus to Reinstate Teacher Unlawfully Removed by School Board.

5. *Mandamus* will lie to compel a school board to reinstate a teacher who is holding under a statutory tenure, and has been removed either without proper proceedings or for an insufficient reason.

[*Mandamus* as remedy to restore party to office, see note in Ann. Cas. 1912A, 930.]

From Multnomah: ROBERT G. MORROW, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

School District No. 1, in Multnomah County, has a population of 20,000 or more persons. Maud L. Richards is the holder of a life diploma, entitling her to teach in any high department of the public schools of the district. On September 22, 1911, the board of directors of the school district elected the plaintiff, whose name was then Maud L. Marsh, a teacher in the Trades School for the ensuing year; on May 23, 1912, she was re-elected for the school year beginning September 16, 1912; on May 19, 1913, she was again

elected for the ensuing school year, which commenced September 15, 1913, and, having been employed for two successive annual terms, her name was placed upon the list of permanently employed teachers, as directed by Chapter 37 of the Laws of 1913, which became effective on June 3d of that year. The plaintiff performed the duties of teacher from September 22, 1911, when first elected, until January 5, 1915, when she received oral notice that she was dismissed because she had married on the preceding day. The school board had adopted a rule that:

“Married women shall not be eligible to positions as teachers in the district except by special resolution of the board. All women teachers who marry during their time of service, thereby terminate their contracts with the district.”

On or about May 19, 1913, the plaintiff received from the board a notice which, so far as material here reads thus:

“At a meeting of the board of directors held on the above date, you were elected a teacher in the schools of this district for the ensuing school year, day sessions. Your term of service will begin on Monday, September 15, 1913. * * By special resolution of the board, all women teachers who marry while in the service of the district, thereby terminate their service with the district; but such marriage shall not operate to bar them from reappointment, should it be deemed by the board to be to the best interests of the school to retain their services. This agreement is subject to the rules and regulations of the board, which are at present in force, or which may hereafter be made while you are in the service of the district. * * By another resolution of the board, it was also ordered and provided, that in case of a repeal of the law making the tenure of the position of teachers permanent, no action of the board would extend the

teacher's service beyond the end of the school year, during which such law should be repealed. If you accept the position to which you have been elected, as herein noted, please fill in the blanks on, and sign the inclosed acceptance form, and file in my office, on or before July 10, 1913; otherwise the board will consider the position vacant, and will proceed to fill same.

"Yours very truly,

"R. H. THOMAS,

"Clerk.

"I accept the position above named and defined, on the conditions specified."

The plaintiff signed the acceptance form and returned the paper to the board.

At some time in the forenoon of January 4th, the plaintiff informed the principal of the school that she "expected to be married that evening, and expected to continue teaching," whereupon the principal called her attention to the rule that marriage terminated the employment of a teacher. The plaintiff also interviewed the city school superintendent in the afternoon of January 4th, and told him, "I expect to be married and expect to go on teaching," and he then "called attention to the by-law of the board." During the evening of January 4th, the plaintiff was married to O. R. Richards, and the next morning she presented herself at the school building at the usual hour, with the avowed purpose of continuing her service as teacher. The principal of the school appeared with a substitute and informed plaintiff that "they had received word from Mr. Alderman [the city school superintendent] that I leave," and thereupon Maud L. Richards left. On January 6th the plaintiff filed with the clerk of the board a petition which recites that she had been summarily dismissed, and asks that "she may be rein-

stated to her former position." No charges were made against Maud L. Richards; no notice was given except as already detailed; no hearing was held; and no action was taken by the board, except as shown by the minutes of the meeting of January 21, 1915, where it is recorded that: "Mr. Alderman submitted the following: * * That the following vacancies have occurred in the various schools which should be filled, and reported that four teachers had been appointed subject to the approval of the board * * School of Trades for Girls, Maud L. Marsh, married 1—4—15. * * It was moved by Director Beach, and seconded by Director Plummer that the place of Maud L. Marsh, reported by Superintendent L. R. Alderman married January 4th, 1915, be declared vacant, and that the appointment of the following teachers be ratified," and the board ratified the appointment of a successor to plaintiff. A trial in the Circuit Court resulted in the allowance of a peremptory *mandamus* against the school board, commanding that the plaintiff be reinstated as a teacher and that her salary be paid "from the date when it should have been paid until such time as the said Maud L. Richards be reinstated to her former position."

The defendants appealed.

AFFIRMED.

For appellant there was an oral argument by *Mr. Charles William Fulton*, with a brief over the name of *Messrs. Fulton & Bowerman* to this effect:

1. The position of a teacher is not an office, and *mandamus* will not lie to restore one to such a position: *Durham v. Monumental S. Min. Co.*, 9 Or. 41; *Habersham v. Sears*, 11 Or. 431 (5 Pac. 208, 50 Am. Rep. 481); *State ex rel. v. Smith*, 49 Neb. 755 (69 N. W. 114); *Coffin v. Board of Education*, 114 Mich.

342 (72 N. W. 156); *Jameson v. Board of Education*, 74 W. Va. 389 (81 S. E. 1126); *Bailey, Habeas Corpus*, etc., p. 1114.

2. The power to remove and discharge is conferred in general and unlimited terms by the statute (Laws 1913, c. 37, p. 69), and the district school board had power to make the marriage of a woman teacher a cause for dismissal: *Ewin v. Independent School Dist.*, 10 Idaho, 102 (77 Pac. 222); *Commonwealth ex rel. v. Board of Education*, 187 Pa. 70 (41 L. R. A. 498); *People ex rel. v. Maxwell*, 63 N. Y. Supp. 1098 (on appeal, 177 N. Y. 494, 69 N. E. 1092).

Even under statutes which prescribe the causes for which a teacher may be discharged, the school board may insert in the contract of employment other reasons that shall be grounds of discharge: *Olney School Dist. v. Christy*, 81 Ill. App. 304; *Dees v. Board of Education*, 109 N. W. 39; 35 Cyc. 1090. That was done in this case by express terms. It must be conceded that the board may refuse to employ married women as teachers, and it both logically and legally follows that it may stipulate in advance, when employing unmarried women teachers, that marriage shall terminate their employment.

3. There are many reasons why the policy adopted by the board is just and wise. In the lower court, however, counsel for petitioner pleaded that such policy casts a stigma on the marriage institution, and the court held it to be contrary to public policy. Of course neither contention is sound. It is no reflection on the state of matrimony. It is simply a recognition of the new and sacred duties which that state imposes, not only on the wife but as well on the husband. They have entered upon a new life. Both have assumed new and additional obligations and duties. It is reasonable to assume that these new and additional

duties and obligations will largely occupy and dominate her mind, and divert her attention from the work which formerly had her undivided attention. Prior to this state her whole energies were directed to and employed in her school work. Now her mind must be largely centered on her new duties and obligations. She, far more than he, is affected by this *status*, so far as concerns the pursuit of their former respective callings. He must continue his efforts along previous or other lines with renewed energy, because now he must not only support himself but his wife as well. She, on the contrary, must care for the home. Her independence, in a considerable degree at least, is surrendered, and in a large measure she ceases to be a free-agent, for her life has now become blended with that of another, and hence her views, convictions and ideals are become the composite result of this blending process. Again, when a woman marries she rightfully assumes that her husband will support her, and society at large expects that of him. The unmarried women who are compelled to work for their livelihood expect that one in their ranks who marries will step aside and make room for one who has no husband to support her. The unmarried woman worker resents, and justly resents, the competition in her labor market of a married woman whose husband is in health and strength, and she has a right to assume that such is the condition of a newly acquired husband. Why should not, and why may not, a school board recognize these conditions?

In the City of Portland there are over nine hundred unmarried women teachers. At the end of the last school year there were thirty-six vacancies to fill and there were over three thousand unmarried women applicants. Does this speak for nothing on this question of public policy? May not this vast army of

capable, earnest, intelligent young women, depending entirely on their own efforts for a living, be given a slight preference over the newly wedded husbands who are seeking positions for their wives to assist in their support, without invading some profound principle of public policy in the administration of our government? When a man takes unto himself a wife, he agrees to support her. Most men insist on performing the contract to the letter. All should be compelled to do so. Speaking for our own profession, we do not hesitate to affirm that no member of it would for a moment contemplate the possibility of shirking that pleasing responsibility. Of course a case will occasionally arise, due to a husband's illness or misfortune, when a wife will be compelled to go out and labor for the support of both. Such cases, however, are exceptional, and rarely occur on the wedding day, and it is only with that day that we have to deal. We therefore beg to inquire what principle of profound public policy will be contravened by conducting public business on the assumption that every American gentleman intends to and will, for at least a reasonable period after marriage, support his wife?

For respondent there were oral arguments by *Mr. Oren R. Richards* and *Mr. Norman S. Richards*, with a brief over the names of *Messrs. Richards & Richards* and *Mr. Coy Burnett* to this effect:

I. *Mandamus* will lie to compel a school board to reinstate a teacher to a position from which she has been unlawfully removed: *Horne v. Chester School Dist.*, 75 N. H. 411 (75 Atl. 431); *Bogart v. Board of Education*, 106 App. Div. 56; *School Dist. v. Shuck*, 49 Colo. 526 (113 Pac. 511); *Barthel v. Board of Education*, 153 Cal. 376 (95 Pac. 892); *People ex rel. v. Board of Education*, 82 Misc. Rep. 684 (144 N. Y.

Supp. 87); *People ex rel. v. Board*, 43 Hun, 537; *Biggs v. McBride*, 17 Or. 640 (5 L. R. A. 115, 21 Pac. 878).

II. Statutes *in pari materia* must be construed together: *Smith v. Kelly*, 24 Or. 464, 475 (33 Pac. 642, 645); *School Dist. No. 2 v. Lambert*, 28 Or. 209 (42 Pac. 221); *Stoppenback v. Multnomah County*, 71 Or. 493 (142 Pac. 832, 837); 36 Cyc. 1151. The statutes which should be thus construed are these: Laws 1911, c. 58, §§ 3, 17, 20-22; Laws 1913, c. 37, §§ 4-8, 10, c. 172, §§ 17, 22, 23.

III. The manner provided by statute for the dismissal of teachers and the revocation of their licenses is mandatory; the power of dismissal can be exercised only in the manner fixed by the statutes: *Barton v. School Dist.*, 77 Or. 30 (150 Pac. 251); *Paul v. School Dist.*, 28 Vt. 575; *Kennedy v. Board of Education*, 82 Cal. 483 (22 Pac. 1042); *Brown v. Owen*, 23 South. 35; *Murray v. City of La Grande*, 76 Or. 598 (149 Pac. 1019).

IV. A by-law providing for the dismissal of teachers which is inconsistent with the provisions of the statutes upon the same subject is void: *People ex rel. v. Maxwell*, 177 N. Y. 494 (69 N. E. 1092); *People ex rel. v. Board of Education (Peixetto Case)*, 82 Misc. Rep. 684 (144 N. Y. Supp. 87, 94); *Jameson v. Board of Education*, 74 W. Va. 389 (81 S. E. 1126, 1130); *Hall Moody Institute v. Copass* (Tenn.), 69 S. W. 327; *Barthel v. Board of Education*, 153 Cal. 376 (95 Pac. 892); *Fairchild v. Board of Education*, 107 Cal. 92 (40 Pac. 26); *Thompson v. Gibbs*, 97 Tenn. 489 (34 L. R. A. 548, 37 S. W. 277); *School Directors v. Wright*, 43 Ill. App. 270; *Goodyear v. School Dist.*, 17 Or. 517 (21 Pac. 664); *Baxter v. Davis*, 58 Or. 109 (112 Pac. 410); *Crawford v. School Dist.*, 68 Or. 388

(137 Pac. 217, Ann. Cas. 1915C, 522, 50 L. R. A. (N. S.) 147); 35 Cyc. 899, 901.

V. The marriage of a teacher is not "good cause" for the dismissal under the laws of Oregon. The rule of the board making marriage a ground of dismissal is void, since it is not "good cause" within the meaning of that term as used in Laws of 1913, Chapter 172, Section 22. The authorities are undivided upon the meaning of this term in such a statute, and are to the effect that "good cause" is a personal disqualification of that particular person to perform the particular duties which are a part of the position in question. "Good cause" goes to the existing personal disqualification as distinguished from an apprehension that the person may become disqualified because that person is about to join a certain class of persons—as, that such person is about to become married, or to become a member of the Lady Maccabees, or a suffragette, or a Methodist, or Baptist: *State v. Common Council*, 53 Minn. 238 (39 Am. St. Rep. 595, 55 N. W. 118); *McCully v. State*, 102 Tenn. 509 (46 L. R. A. 567, 53 S. W. 134, 137); *State ex rel. v. Wallbridge*, 62 Mo. App. 162; *State ex rel. v. Wallbridge*, 69 Mo. App. 657, 669; *People ex rel. v. Mayor of New York*, 19 Hun, 441, 448; *People v. Thompson*, 94 N. Y. 451, 452; *Guden v. Dike*, 71 App. Div. 422 (75 N. Y. Supp. 794, 798); *Board of Street Commrs. v. Williams*, 96 Md. 232 (53 Atl. 923); *Haggerty v. Shedd*, 75 N. H. 393 (74 Atl. 1055).

VI. The public policy of Oregon, as shown by the legislation through more than thirty years, is against the position taken by appellant.

We submit that the board cannot discharge the respondent on account of whim or caprice or prejudice, or on account of some archaic rule that has been

handed down to them from past ages by a prior school board, as was testified to by the school clerk. The people of the State of Oregon have in the past twenty years progressed in favor of the rights of women; they have granted to married women the right to hold school offices generally (Section 4116, L. O. L.); the right to vote; and in the Permanent Tenure Act have granted them a permanent right to teach in the public schools. The people of Oregon passed the Permanent Tenure Act to insure teachers of the permanency of their positions so long as they were efficient in the particular work allotted to them, and it is for two reasons, so that the teacher might feel secure in her position and so that the public school would obtain thereby a better class of teachers. The people of Portland are now employing in the schools married teachers, and admittedly they are good teachers, yet in the face of this they pick out one teacher and, because she marries, cast stigma and reproach upon the marriage relation by discharging such teacher. They thereby cast stigma upon a relation which is legalized by the state, and one in favor of which public policy is exercising every endeavor. They do this because they say that during the brief period of the honeymoon the teacher is not as proficient as she was before her marriage.

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So far as suspension during a period when a teacher is not proficient, the law gives the board a right to suspend, but in no case gives a right to discharge. The reasons *pro* and *con* advanced upon the policy of the employment of married teachers would be appropriate if addressed to the law-making power, but they are of no concern to a school board, which is a creature of statute, and whose powers are defined and limited by statute. If the legislature had desired that mar-

riage should terminate a teacher's employment or work a revocation of her certificate, it could and would have made an appropriate provision on that subject. It is not to be presumed that the legislature intended to include in the grounds of dismissal one which the public policy of the state has generally favored.

MR. JUSTICE HARRIS delivered the opinion of the court.

In the final analysis the decision of this controversy depends upon whether the school board possesses the right to enforce a rule which provides that the marriage of a woman teacher automatically terminates her "service with the district." The question presented for determination necessarily involves a consideration of certain statutes, and for that reason it is proper first to direct attention to such legislative acts as may be applicable. In 1913 the legislature passed two measures, which became effective simultaneously on June 3, 1913. One act is known as Chapter 37 of the Laws of 1913, and the other is referred to as Chapter 172 of the Laws of 1913. The provisions of Chapter 37, so far as they may be of interest here, read thus:

"Section 1. The board of directors of every school district in this state now having or which at any time hereafter shall have a population of 20,000 or more persons shall have the power and authority to appoint and remove, hire and discharge all teachers, officers, agents and employees as it may deem necessary, and to fix their compensation. * *

"Sec. 3. The teachers employed in any such district or districts, during their first two years of service shall be classed as probationary teachers. * *

"Sec. 4. Teachers who have been employed in the schools in any such district or districts as regularly appointed teachers for not less than two successive

annual terms shall by the board of directors be placed upon the list of permanently employed teachers.

"Sec. 5. Teachers so placed upon such list shall not be subject to annual appointment, but shall continue to serve until dismissed or discontinued in the service by the board in the manner herein provided, subject to the rules of the board concerning suspensions, but such rules shall be reasonable and for the good of such schools. * *

"Sec. 6. Before being dismissed any teacher on the permanent list shall receive written notice, stating the reason for the proposed dismissal, together with a copy of any charges or complaints which may be filed against him or her, and upon written request filed with the clerk the teacher shall be entitled to and given a hearing before the board within ten days after said notice, with full benefit of witnesses and subpoenas issued in blank by and over the hand of the clerk therefor and the right to be represented by counsel. Of any such hearing such teacher and each member of the board shall have due notice not less than three days before the date set for the hearing, and such hearing may be continued from time to time on account of sickness or absence of material witnesses. * *

"Sec. 8. All complaints and criticisms made against any teacher on such list shall be in writing and signed by the person preferring the same and filed with the clerk of such board, and the same may be inspected at any time during office hours by such teacher or any other person. * *

"Sec. 10. All teachers who shall have been employed in such district or districts two or more years prior to the first day of July, 1913, shall be eligible to re-election as permanent teachers, and all such teachers who shall be re-elected for employment by the board for the school year beginning in September, 1913, shall be permanent teachers under the provisions of this act.

"Sec. 11. All acts and parts of acts in conflict herewith are hereby repealed. Provided, however, that

all general laws of this state relating to public schools shall be applicable to districts under this act except in so far as the same may be in conflict with the provisions hereof."

Chapter 172 in detail enumerates the duties and powers of district school boards, and among "the general duties of the district school boards of the State of Oregon" it is prescribed by Section 1, subdivision 22, that:

"The board shall dismiss teachers only for good cause shown, and in case the board shall pass an order to dismiss, the material reason therefor shall be spread upon the record by the district clerk."

The contention of the defendants proceeds upon the theory that Section 1 of Chapter 37 confers upon the board the unrestricted power to discharge teachers "as it may deem necessary," while the argument of plaintiff is founded upon the claim that Section 1 must be read in connection with all the provisions of that chapter, as well as "all general laws of this state relating to public schools," and that, when thus read, it will be ascertained that the power of the board to dismiss is limited to such causes as may be good or reasonable.

1. No attempt is made to decide whether the board is empowered to discontinue a position, and on that account terminate the service of a teacher; but, the discussion will be confined to a consideration of the single question presented by the facts, because here the plaintiff was dismissed by a rule which was designed to operate automatically the moment the plaintiff married. No formal charge was filed; no written notice was given; no copy of a complaint was received by plaintiff; and the position was filled by the appointment of another teacher. If Section 1 of

Chapter 37 stood alone, there would be ample reason to support the contention that the power to dismiss is unrestricted; but it does not stand by itself. The chapter provides for permanent tenures for teachers, clothes the board with power to dismiss teachers, and prescribes a procedure which must be followed when the board attempts to exercise its power of dismissal. When a teacher is "placed upon the list of permanently employed teachers," that teacher by force of the law shall continue to serve until dismissed in the manner provided for by Chapter 37 and "the manner herein provided" contemplates that there shall be a complaint, which must be in writing and filed with the clerk of the board, the teacher shall be given a written notice, stating the reason for the proposed dismissal, together with a copy of the complaint which has been filed, and if the teacher files a written request with the clerk, then the board must give the teacher a hearing within 10 days. It is true that the power to dismiss exists, but the power cannot be exercised unless the board observes the procedure pointed out by the very statute which confers the right to dismiss.

It is plain that the statute contemplates that the complaint or criticism or charge shall present some good cause or some reasonable cause for dismissal. If the board can dismiss for any cause, whether it be reasonable, capricious or whimsical, then a hearing would be an idle ceremony. Requiring a written complaint, making notice of the charge necessary, and providing for a hearing, all imply at least that the charge made and to be heard shall afford a reasonable cause for dismissal before the board can discharge a teacher, and the implication is emphasized when it is remembered that the main purpose of Chap-

ter 37 is to provide permanent tenures for teachers: *Guden v. Dike*, 71 App. Div. 422 (75 N. Y. Supp. 794).

The conclusion that the dismissal must be for some reasonable cause is still further strengthened by the terms of Section 5, which declares that teachers upon the permanent list shall continue to serve "until dismissed or discontinued in the service by the board in the manner herein provided, subject to the rules of the board concerning suspensions, but such rules shall be reasonable and for the good of such schools."

The meaning of the term "suspensions" may be doubtful. It may apply only to cases of temporary forced withdrawals, as where a teacher is temporarily relieved from service, or it may have a more comprehensive meaning and include, not only temporary releases, but also permanent dismissals. Whether the term be accorded the larger or the narrower meaning, the rules concerning such "suspensions" must be reasonable and for the good of the schools. If the rules mentioned in Section 5 include rules concerning dismissals, then we have the positive mandate of the law that such rules shall be reasonable; and, if the language of Section 5 is referable only to a temporary discontinuance of service, then the implication that the graver and more important act of dismissal must be founded upon some reasonable cause is made more manifest.

2. There is yet another statute which accentuates the conclusion that a teacher on the permanent list can only be discharged for some good or reasonable cause. Section 11 of Chapter 37 recites that:

"All general laws of this state relating to public schools shall be applicable to districts under this act except in so far as the same may be in conflict with the provisions hereof."

Subdivision 22 of Section 1, Chapter 172, Laws of 1913, is a general law relating to public schools, and by the terms of that law "the board shall dismiss teachers only for good cause shown." Assuming that subdivision 22 of Section 1 does not apply to the instant case, yet the general law affords protection, against unreasonable charges, to teachers who are not within the classes intended to be favored by Chapter 37, and the fact that both Chapters 37 and 172 were enacted by the same lawmakers only fortifies the view that Chapter 37 limits the right of the board to dismiss to the cases where reasonable cause is shown, and that the limitation attaches to the power to dismiss, either because of the express language found in Section 5, or if that section be given the narrower meaning, then the language of the act, when considered as a whole, gives expression to the limitation by necessary implication. If the right to dismiss cannot be exercised unless a good or reasonable cause is shown, it necessarily follows that the board is powerless to discharge for a cause which is not reasonable. Marriage either does or does not furnish a reasonable cause. If it is not a reasonable cause, then the board was utterly powerless to dismiss, because their authority is limited to the cases within the purview of the statute, and the law contemplates dismissal for reasonable cause only: *People ex rel. Murphy v. Maxwell*, 177 N. Y. 494 (69 N. E. 1092); *People ex rel. v. Board of Education*, 82 Misc. Rep. 684 (144 N. Y. Supp. 87); *Jameson v. Board of Education*, 74 W. Va. 389 (81 S. E. 1126); *Barthel v. Board of Education*, 153 Cal. 376 (95 Pac. 892); *Fairchild v. Board of Education*, 107 Cal. 92 (40 Pac. 26); *Kennedy v. Board of Education*, 82 Cal. 483 (22 Pac. 1042); *Thompson v. Gibbs*, 97 Tenn. 489 (37 S. W. 277, 34 L. R. A. 548). If the act of marriage is alone a reasonable cause, then the

attempted dismissal was ineffective because no written complaint was filed and the plaintiff was not furnished with a written notice, stating the reason for the proposed dismissal, and she did not receive a copy of any charge. The attempted dismissal was void in any event. If marriage is not a reasonable cause, the dismissal was ineffective, because the board was without any power to discharge for an unreasonable cause; if marriage is a good cause, the summary act of the board was of no effect because the power to dismiss was not exercised in the manner provided by law.

3. It is argued, however, that the notice received by plaintiff and signed by her on or about May 19, 1913, constituted a contract which bound the teacher to abide by the rule concerning marriage. The writing purports to cover the "ensuing school year," which commenced on September 15, 1913. No contract was signed upon the expiration of the "ensuing school year," and, in the absence of Chapter 37, a continuance of service might be presumed to be governed by the terms of the contract made in 1913. The writing, however, purports to cover the "ensuing school year," which commenced on September 15, 1913, and even though it be assumed that her service during "the ensuing school year" was governed exclusively by the terms of the contract made in 1913, unmodified by the provisions of Chapter 37, which became a governing law on June 3, 1913, that assumption cannot be continued and made applicable to her service on January 4, 1915, because at that time the "ensuing school year" had expired and the plaintiff occupied the position of teacher by virtue of the express terms of a statute. The relation had been created by and existed because of a law which had been enacted for that purpose.

Conceding that the contract signed in May, 1913, was valid when signed, still a stipulation making marriage a cause for peremptory dismissal would not be binding where the contract was made after June 3, 1913, when Chapter 37 became a law. The board cannot dismiss at all for an unreasonable cause, and can dismiss for a reasonable cause only in the manner provided by Chapter 37. Keeping in mind the purpose for which the statute was enacted, the board cannot, by contract, enlarge a power which is limited and restricted by the very law that creates the power. The board cannot do indirectly that which it is prohibited from doing directly. An apt illustration of this rule appears in *Thompson v. Gibbs*, 97 Tenn. 489 (37 S. W. 277, 34 L. R. A. 548). The school authorities cannot "accomplish by indirection that upon which the statute had placed its ban": *Fairchild v. Board of Education*, 107 Cal. 92 (40 Pac. 26). See, also, *People ex rel. v. Board of Education*, 82 Misc. Rep. 684 (144 N. Y. Supp. 87, 94).

The views herein expressed might be sufficient to dispose of the instant case, but we prefer to proceed with the inquiry and determine whether the single fact of marriage can, in advance and alone, be said to be a reasonable cause for dismissal, keeping in mind all the while that the purpose of Chapter 37 is to provide permanent tenures for teachers. Efficiency and competency of teachers and the welfare of the schools are of course consummations "devoutly to be wished." If a teacher becomes inefficient or fails to perform a duty, or does some act which of itself impairs usefulness, then a good or reasonable cause for dismissal would exist. The act of marriage, however, does not, of itself, furnish a reasonable cause. That the marriage *status* does not necessarily impair the competency of all

women teachers is conceded by the school authorities when they employ married women, as they are even now doing, to teach in the schools of this district. The clerk of the board admitted that in some instances a woman becomes a better teacher after marriage than she was before. The reason advanced for the rule adopted by the board is that after marriage a woman may devote her time and attention to her home rather than to her school work. It would be just as reasonable to adopt a rule that if a woman teacher joined a church it would work an automatic dismissal from the schools on an imagined assumption that the church might engross her time, thought, and attention to the detriment of the schools; but such a regulation as the one supposed would not even have the semblance of reason. It must be conceded that quite a different case is presented where the act ruled against is inherently wrong. The act to which the instant rule relates does not involve a single element of wrong, but, on the contrary, marriage is not only protected by both the written and unwritten law, but it is also fostered by a sound public policy. It is impossible to know in advance whether the efficiency of any person will become impaired because of marriage, and a rule which assumes that all persons do become less competent because of marriage is unreasonable because such a regulation is purely arbitrary. If a teacher is just as competent and efficient after marriage, a dismissal because of marriage would be capricious. If a teacher is neglectful, incompetent and inefficient, she ought to be discharged whether she is married or whether she is single. Instructive discussions of the principles involved herein may be found in *State ex rel. v. Common Council*, 53 Minn. 228 (55 N. W. 118, 39 Am. St. Rep. 595); *McCully v. State*, 102 Tenn. 509 (53 S. W. 134,

46 L. R. A. 567); *People ex rel. v. Mayor*, 19 Hun (N. Y.), 443; *People ex rel. v. Thompson*, 94 N. Y. 451; *Guden v. Dike*, 71 App. Div. 422 (75 N. Y. Supp. 794); *Board of Street Commrs. v. Williams*, 96 Md. 232 (53 Atl. 923). See, also, *Biggs v. McBride*, 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115).

5. Since the mere fact of marriage is not alone sufficient to warrant the discharge of a teacher, *mandamus* is available as a remedy: *People ex rel. v. Board of Education*, 82 Misc. Rep. 684 (144 N. Y. Supp. 87); *Id.*, 160 App. Div. 557 (145 N. Y. Supp. 853); *Kennedy v. Board of Education*, 82 Cal. 483 (22 Pac. 1042); *State ex rel. v. Board of Education*, 18 N. M. 183 (135 Pac. 96, 49 L. R. A. (N. S.) 62).

Some complaint is made of the form of denial appearing in the reply. While the form is not ideal, yet the denial in the instant case is not like the pleading in *Kabat v. Moore*, 48 Or. 195 (85 Pac. 506), but bears more of a resemblance to the pleading which was approved in *Harrison v. Birrell*, 58 Or. 410 (115 Pac. 141).

The judgment of the Circuit Court was correct, and it is affirmed.

AFFIRMED.

Argued December 11, demurrer overruled December 28, 1915.
Rehearing denied January 18, 1916.

PETERSON v. LEWIS.

(154 Pac. 101.)

Amicus Curiae—Effect on Proceedings in Making Such Appearance.

1. In a *mandamus* proceeding in the Supreme Court, where briefs are filed, oral arguments made by counsel appearing as *amicus curiae* in the interest of the state highway commission, in which proceeding the duties devolving upon the state engineer are involved and sought to be regulated, the interest of the commission will be considered the same as if it had been made a party to the proceeding.

Mandamus—Under What Circumstances the Writ will Issue—Construction of Contracts.

2. Where the law imposes an obligation on a particular person to perform some particular act, and no other specific remedy is provided

for, *mandamus* is the proper remedy, and the remedy may be applied to compel the performance of a contract that involves an official duty, though it will not lie to enforce private contracts.

**Highways—Duties of State Engineer in Construction of Highways—
“Persons Interested.”**

3. The title of the act of 1913, Laws of 1913, page 663, sets forth its objects and purposes, and provides that the state highway engineer shall render assistance to the several County Courts and highway officers in the construction of roads. Under Section 6 of the act it is made the duty of the state engineer to furnish such information and advice as may be requested by persons interested in the construction and maintenance of public highways, and a contractor constructing a highway pursuant to a contract with a county is an “interested person,” and is entitled to the information.

Highways—Duties of State Engineer in the Construction of County Roads.

4. Under the provisions of Section 6 of the act of 1913, Laws of 1913, page 663, requiring the state highway engineer to act as adviser for and co-operate with the county authorities having in charge the building of county roads, when called upon so to do, even to such an extent as will carry into execution the plans adopted by him, following the policy initiated by the federal government in the construction of sample county roads, requires active co-operation on the part of such engineer, and not mere casual advice on building public county roads.

Mandamus—Compelling Performance of Official Duties.

5. The state highway engineer is required under the act of 1913, Laws of 1913, page 663, to provide information to the contractor and render assistance to the county authorities, and, among other things, is to furnish a final estimate of the work done on the contract, and where he fails or refuses, may be compelled to furnish such final estimate by *mandamus*.

[As to *mandamus* to compel performance of duty of official, see note in 125 Am. St. Rep. 493.]

Statutes—Title and Subject Matter—Validity.

6. The legislature of 1913, Laws of 1913, page 663, passed an act creating the office of state highway engineer, and prescribed what his duties were. The county court of Clatsop County and plaintiffs entered into a contract whereby the latter agreed to build and did construct certain roads, such contract specifying that the state highway engineer was to make a final estimate of the work performed thereunder and the value of said work, and that after approving the estimate so prepared the county was to pay for the work. After the contract was entered into, and before the completion of the work, the legislature of 1915, Laws of 1915, page 537, passed a law entitled, “An act abolishing the office of state highway engineer,” etc., and providing that the duties performed by such officer be transferred to the state engineer, and further providing for the appointment of a deputy state engineer by the chairman of the state highway commission, and that such deputy shall be qualified and versed in scientific road building, and shall perform the duties prescribed by the state highway commission, and fixes his salary and provides for expenses. *Held*, that

Laws of 1915, page 537, Section 3, was void as being repugnant to the title of the act, under Article IV, Section 20, of the Constitution.

Mandamus—Parties—"Deputy" to Act Only in Behalf of His Principal.

7. The act creating the office and prescribing the duties of the state highway engineer, Laws of 1913, page 663, were amended by Laws of 1915, page 537, transferring those duties to the state engineer and requiring such duties to be performed by his deputy. A proper performance of the duties required by the act could be enforced by *mandamus* against the state engineer, for the reason that the deputy state engineer was not an independent officer, but acted only on behalf of his principal.

Statutes—Construction of a Partial Invalid Statute.

8. In construing a statute, the rule is to give such a meaning, if possible, as will render it valid and effectuate the will of the legislature, and where a part of an act is valid and conforms to the policy and intent of the legislature, it is not rendered unconstitutional by a later section that is repugnant and void to this policy and intent, and in such a case the statute is void only as to that section.

Constitutional Law—Legislative Power Cannot be Delegated.

9. Under Article IV, Section 1, of the Constitution, the attempt of the state highway commission to delegate the duties imposed by statute upon the state engineer is void and of no effect whatever, for the reason that legislative power cannot be delegated to a commission.

Highways—Statutes Relating to Their Construction.

10. Under statutes relating to the construction of highways, it is the duty of the state engineer to furnish the county authorities a final estimate of the work done, and whether or not the road is completed, and the amount due the contractor under the contract, all of which is a part of the construction work of such highway.

Statutes—Duty of State Engineer in the Construction of Highways and State Roads.

11. The act of 1913, Laws of 1913, page 663, as amended by Laws of 1915, page 537, provides that the state engineer is substituted for the state highway engineer, and all duties prescribed by the statutes referred to pertaining to said official shall be performed by the state engineer, including the duty of assisting the highway commission in the construction of state roads.

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE BEAN.

This is an original proceeding in *mandamus* brought by the plaintiffs Peterson and Johnson against John H. Lewis, state engineer, to require defendant as such officer to make and deliver to the petitioners and to the County Court of Clatsop County, Oregon, a final

estimate of the work done by them, and the value thereof, under their contract with the county of December 18, 1914, for the construction of a certain county road therein extending from the City of Astoria to the west line of Columbia County. The alternative writ asserts the following facts: The contract provided that the work should be done according to the plans, specifications and schedule of rates, prices and maps of the road which were prepared by the state highway engineer, and that all the work thereunder should be done under the supervision of the field engineer selected by the state highway engineer; the work, however, to be approved and accepted by the latter. The contract further provided that payment for the work done by the contractors should be by warrants of Clatsop County issued upon vouchers of the state highway engineer approved by the County Court, out of any money on hand from the sale of its permanent road bonds, or after January 1, 1915, by warrants drawn on the general fund of that county. Further provision was made for the making of partial payments during the progress of the work upon estimates of the engineer in immediate charge thereof, and the contract contained the following:

“The state highway engineer shall, as soon as practicable after the completion of this contract, make a final estimate of the amount of work done thereunder, and the value of such work, and Clatsop County shall, at the expiration of 35 days from and after such estimate is so made, and is approved by the County Court of Clatsop County, pay the entire sum so found to be due hereunder after deducting therefrom all previous payments and all amounts to be retained under the provisions of this contract. All prior partial estimates and payments shall be subject to correction in the final estimate and payment.”

The road referred to is one which was constructed by the county mentioned with funds derived from the issue and sale of its bonds under Chapter 103 of the General Laws of Oregon for 1913, pursuant to the vote of the taxpayers of the county. The County Court requested the assistance of the state highway engineer in the matter of the construction of the road under the terms of Chapter 339 of the General Laws of 1913, page 663, providing for the appointment and prescribing the duties of the state highway engineer. The contract was executed pursuant to such arrangement. The contractors began the work thereunder soon after its execution, and, except for temporary suspensions, prosecuted the same until September 4, 1914, when it was finished. According to the terms of the contract, the field engineer in charge of the work furnished the contractors with preliminary estimates from time to time during the progress of the work. Based upon these estimates, the contractors were paid installments from time to time; the theory of the contract being that, after the completion of the work, the state highway engineer himself should give to the contractors a final estimate showing the amount of work done and the value thereof, correcting all errors in the preliminary computations in order to determine the balance due the contractors. The state highway engineer performed the duties of the engineer under the terms of the contract, which were requested by the County Court, until May 22, 1915. Thereafter they were performed by a chief deputy state engineer until August 27, 1915, when the highway commission passed an order purporting to relieve the defendant of all duties and responsibilities in connection with the highway work of the State of Oregon. Thereupon the appointment

of the chief deputy state engineer was revoked by the state engineer.

The petition for the writ alleges that Chapter 337 of the General Laws of 1915 imposed upon the state engineer, an elective officer, the duties previously performed under the contract and law by the state highway engineer by virtue of Chapter 339 of the General Laws of 1913, and that the former is the only officer or person authorized by law or the contract to make such final estimate; further, that although more than 80 days have elapsed since the date of the completion of the work, the state engineer has failed and refused to make or deliver to the contractors, or to the County Court of Clatsop County, the final estimate made necessary by the contract before the contractors can enforce any claim for final settlement against the county. The defendant demurred to the writ upon the ground that it does not state facts sufficient to constitute a cause of action.

DEMURRER OVERRULED.

For plaintiffs there was a brief over the name of *Messrs. Griffith, Leiter & Allen*, with an oral argument by *Mr. Harrison Allen*.

For defendant there was a brief and an oral argument by *Mr. G. W. Allen*.

As *amici curiae* there was a brief with oral arguments by *Mr. Charles L. McNary* and *Mr. John L. McNary*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. It is claimed by defendant that the highway commission by an order relieved the state engineer of all duties and responsibilities in connection with the highway work, and provided that it should be done by I. E.

Cantine, chief deputy state engineer. On account of the action taken by the commission, the state engineer endeavors to assume a neutral attitude in the premises. Counsel have appeared as *amici curiae*, made oral argument in the interest of the highway commission, and also filed a brief. The interest of the commission should be considered to the same extent as though it were a party to this cause. It is contended by the petitioners that under Chapter 339 of the Laws of 1913, the duties to be performed by the state engineer are separate and distinct from those which that act requires him to perform in connection with the state highway commission; that he is authorized and required by law to act for the various counties of the state in the capacity of an engineer in the matter of road construction; that he, having been substituted for the state highway engineer, is the only officer recognized by the law or the contract to perform these functions. It is suggested on behalf of the defense that the plaintiffs are not entitled to the benefit of the writ, for the reason that the duty, if it exists, is a contractual one and not imposed by law.

2. The writ lies to compel the performance of an act which the law imposes as a duty resulting from an office, trust or station. Whenever the law gives power to or imposes an obligation on a particular person to do some particular act or duty, and provides no other specific remedy, for the performance thereof, the writ will issue. Duties of this kind need not be specifically stated in the law. If they are imposed by implication from a fair, reasonable construction of the law, it is sufficient. It is not necessary that they be imposed by law on the individual in question, provided he has put himself in the position from which by law the duties accrue: *Merrill, Mandamus*, § 13. By the same author-

ity (section 16), since the object of the writ is to enforce duties created by law, it will not lie to enforce private contracts, unless it is extended to such cases by statutory enactment. Where, however, a contract involves an official duty, the rule is otherwise, since that is one of the grounds for the issuance of the writ.

It is maintained by counsel in behalf of the highway commission that the chief deputy state engineer is an independent officer, upon whom, if anyone, the alleged duty rests. These questions require a construction of the statutes of 1913 and 1915. First. What were the duties of the highway engineer in the premises, under the provisions of the act of 1913? As we go along it will be well, in the same connection, to note to some extent the general purpose and scope of the act in order to keep in mind the legislative object and intent. The title indicates that its objects and purposes are: (1) To create a state highway commission, defining the duties thereof, and making provision for the payment of expenses while engaged in the performance of such duties; (2) to create the office of state highway engineer, provide for the appointment of such officer, prescribe his duties, fix his salary, provide for the conduct of subordinates in, and payment of expenses of, his office; (3) to prescribe the duties of the county courts and other county officials in relation to the purposes of the act; (4) to provide for the creation of a state highway fund, the levying of a tax to create the same, and the use and disbursements thereof; (5) to provide for the employment of convicts on roads; and (6) to make an appropriation for carrying out the purposes of the act. By this chapter the state highway commission is created, and provision is made for the appointment of a state highway engineer who shall be versed in scientific road construction. Viewing this statute from a

general standpoint, it appears that a scheme was inaugurated for the construction of roads by the state and its counties working in unison, in order that state and county roads may eventually connect and form a continuous highway. In order to accomplish this, the act provides that the state highway engineer shall render assistance to the several County Courts and highway officers in promoting highways and in the improvement and construction of roads. As a matter of reciprocity, it enjoins upon the latter and other county highway officers the duty of furnishing the former, upon his written request, with all available information in connection with the building and maintenance of public highways and bridges in their respective localities: See Section 7. Section 4 of the act directs that the engineer shall act in an advisory capacity to the County Courts of the different counties in the matter of road construction and maintenance whenever requested so to do. This section further specifically provides:

“Upon request of the County Court of any county said engineer shall furnish specifications for any piece of proposed road construction in such county upon being furnished the necessary information and data to enable him to prepare such specifications; and such specifications shall be so furnished free of all costs to such county.”

The latter part of Section 6 is as follows:

“Said engineer may be consulted at all reasonable times by the county officers having care and authority over highways, culverts and bridges, and shall advise such officers relative to the construction, repair, alteration or maintenance of the same, and shall furnish such other information and advice as may be requested by persons interested in the construction or maintenance of public highways, and he shall at all times lend his

aid in encouraging and promoting highway improvements throughout the state. Said engineer shall co-operate with all highway officers, and shall assist county authorities in all matters pertaining to the construction of roads when called upon to do so by the County Court."

Separate and apart from the duties of the engineer relating to the construction of state roads, and the like, as prescribed by the state highway commission, it is plain that the legislature imposed upon that officer the duty of furnishing plans and specifications for proposed road construction, upon the request of the proper County Court, and necessary information and data therefor. Such plans, etc., are to be kept on file in his office. By the terms of the statute this assistance is to be rendered "free of all costs to such county." The engineer is directed by law to advise such officers relative to the construction or maintenance of highways and bridges and to furnish such other information and advice as may be requested by "persons interested" in such work. It would seem that persons constructing a highway pursuant to a contract with a county would certainly be interested in such undertaking within the meaning of the statute. Evidently the lawmakers believed that the information and advice provided for would avail nothing unless in case of road contracts it were extended to the contractor and carried out in the construction of the thoroughfare.

4. Not only is the engineer to advise, but Section 6 immediately specifies that he shall co-operate with and assist, county authorities in such matters when called upon to do so, following the policy initiated by the federal government in superintending the construction of certain county roads as samples. The law does not contemplate mere casual advice by the engineer, but

rather that he shall on appropriate occasions act in an advisory capacity in building public county roads to an extent sufficient to carry into execution the plan which he has made. It provides for rendering valuable aid to counties in the improvement of public roads with the apparent object of attaining a symmetrical system of highways. An annual tax is ordained to be levied and an appropriation made to effect the purpose of the law. In consonance with the spirit and letter of the statute, the highway engineer made plans, specifications and estimates for the work which were embraced in and made part of the contract with the plaintiffs, by the terms of which under the law that official was made the arbiter of the work in the first instance. In short, pursuant to the statute, he assumed the duties of engineer in the construction of the highway.

5. In the furtherance of the contract and the carrying out of the purpose of the act, that law imposes the duty upon the engineer to provide information for the contractor and render assistance to the county authorities by furnishing a final estimate of the amount of the work done by the petitioners under the contract; therefore the writ is an appropriate remedy to require the proper officer to perform such function: *Wren v. Indianapolis*, 96 Ind. 206; *Conn v. Board of County Commrs.*, 151 Ind 517 (51 N. E. 1062); *People ex rel. Peck v. Buffalo State Asylum*, 8 N. Y. Supp. 396; *State v. Holliday*, 8 N. J. Law, 205.

6, 7. This brings us to the difficult problem of ascertaining upon whom the duty mentioned rests. In 1915, the legislature, adopting a policy of consolidation of commissions and offices, enacted Chapter 337 of the General Laws of Oregon, page 537. The title of the act is as follows:

"An act abolishing the office of state highway engineer as defined by Section 3 of Chapter 339 of the Session Laws for 1913, and transferring and conferring the powers, duties and work of the state highway engineer upon the state engineer, and providing for the appointment of a deputy in the office of the state engineer who shall be versed in scientific road construction, and fixing his compensation."

Section 1 provides that the office known as the state highway engineer, as defined by Section 3 of Chapter 339 of the Session Laws of 1913 is hereby abolished, and the powers, duties and work now performed by the state highway engineer shall be vested in and placed under the charge and direction of the state engineer, and, wherever in any law now in force in the State of Oregon the name "state highway engineer" appears, it shall be considered that the name "state engineer" is substituted in lieu thereof. Section 2 directs that all records, maps, drafts and furniture relating to the work and business of the office of state highway engineer shall be transferred and lodged with the state engineer. Section 3 ordains that the chairman of the state highway commission may appoint one chief deputy in the office of the state engineer, who shall be versed in scientific road construction and duly qualified to act as such, and who shall serve at the pleasure of the chairman of the state highway commission, and whose duties shall be such as prescribed by the state highway commission. That section also fixes his salary and provides for expenses.

Thus far there is little difficulty or contention as to the meaning of the statutes in question. Apparently after the drafting of the original bill, by an amendment there was added to Section 3 of the act the following:

"All work in the department which has heretofore been in the charge of the state highway engineer shall

be under the direct supervision of said chief deputy state engineer; and such additional deputies and assistants as the state highway commission shall deem necessary in said road department, shall be appointed by said chief deputy state engineer subject to the approval of the chairman of the state highway commission."

It is the contention of the plaintiffs: (1) That the state engineer is the only officer recognized by the law or the contract to perform the duties mentioned; (2) that all that portion of the act of 1915 which attempts to impose upon the chief deputy state engineer the work in the department formerly done by the state highway engineer is void under Article IV, Section 20, of the Constitution, in that the act embraces a subject which is not included in the title, namely, that having reference to the performance of the work in question by the chief deputy, who was designed as a deputy for the state engineer to be answerable to him in the true sense of that term. On behalf of the commission it is contended that:

"Those duties defined by the earlier law remain unimpaired, but the duties which were originally cast upon the state highway engineer by prescription from the state highway commission are no longer to be exercised by the state engineer, but are transferred, by the power of Chapter 337 of the Laws of 1915, upon the deputy engineer because the law requires him to be versed in scientific road construction."

In its final analysis the position taken in opposition to plaintiffs is that the chief deputy state engineer is an officer entirely independent of the state engineer. The latter part of Section 3 quoted above is in direct conflict with the title of the act, and if given literal force, instead of merging the office of highway engineer with that of state engineer, according to the

clearly expressed legislative intent, the effect of Chapter 337 would be merely to change the title of the state highway engineer. Such provision is not within the scope of the title of the act. The title of an act defines its scope. It can contain no valid provisions beyond the range of the subject there stated: *Sutherland*, Stat. Const., § 145. See, also, *State v. Levy*, 76 Or. 63 (147 Pac. 919); *State v. Perry*, 77 Or. 453 (151 Pac. 655).

8. We understand it to be a governing rule of construction to give a statute such a meaning, if possible, as will render it valid and effectuate the will of the law-makers as expressed: *Schaedler v. Columbia Contract Co.*, 67 Or. 412 (135 Pac. 536); *Kansas P. Ry. Co. v. Commissioners*, 16 Kan. 594. It is a rule of statutory construction that, where the first section of a statute conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by unconstitutional provisions in a later section which do not conform to this policy and intent. In such case the later provision is nugatory and will be disregarded: Section 20, Article IV, of the Constitution; *Endlich*, Interpretation of Stat., § 183; *State v. Bates*, 96 Minn. 110 (104 N. W. 709, 113 Am. St. Rep. 612); *McCormick v. West Duluth*, 47 Minn. 272 (50 N. W. 128). The latter part of Section 3 of Chapter 337, above quoted, is repugnant to Article IV, Section 20, of the Constitution, which provides that:

“Every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be embraced in the title. And if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title”: *Clemmensen v. Peterson*, 35 Or. 48, 49 (56 Pac. 1015); *Spaulding Log. Co. v. Independence Imp. Co.*, 42 Or. 397 (71 Pac. 132); *Simon v. Northup*, 27 Or. 505 (40 Pac. 560, 30 L. R. A. 171).

Therefore the latter part of Section 3 does not relieve the state engineer of the duty thrust upon him by the two acts, nor make the chief deputy an independent official. On the other hand, it would seem that, after two years' experience, it was deemed wise by the legislative branch of the state government to so change the *modus operandi* relating to the highway engineer as to provide that the work of that officer should be subject to the supervision of another skilled civil engineer; the object being the centralizing of the responsibilities as recommended in the message of the governor appertaining to that subject, in order to secure a higher state of efficiency and promote economy. That the chief deputy is subordinate to the state engineer is indicated by the words "chief deputy state engineer," as well as by the provisions of Sections 1 and 2 of the later act. A "deputy" is defined in 13 Cyc. 1043, as follows:

"One appointed as the substitute of another, and empowered to act for him in his behalf or on his behalf; one who is appointed, designated or deputed to act for another; one who occupieth in right of another; and for him regularly his superior will answer; one authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter; one who by appointment exercises an office in another's right; one who exercises an office, etc., in another's right having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable."

To the same effect is 3 Words and Phrases, page 2008.

9. The statute referred to imposes upon the state engineer the duties enumerated in Chapter 339 of the Laws of 1913. That official is responsible to the state and parties coming within the terms of the act. The chief deputy state engineer is answerable to his su-

perior. "No man can serve two masters." Any other arrangement in the premises would naturally lead to chaos and produce confusion. The state engineer cannot be relieved of the trust reposed in him by the statute, except by the expressed will of the lawmakers, and the order of the highway commission of August 27, 1915, did not have that effect. Legislative power cannot be delegated to a commission: Section 1, Article IV, of the Constitution; Sutherland, Stat. Const. (2 ed.), Section 93; *State v. Orange*, 60 N. J. Law, 111 (36 Atl. 707).

10. The determination of whether or not a road is completed, and the amount due for the construction thereof, is as much the carrying into execution of the statute as the enforcement of any of its other provisions. Roads cannot be constructed without compensation.

It being the statutory duty of the state engineer to furnish the required certificate and information, the plaintiffs are entitled to the relief prayed for; otherwise they might be remediless and justice be defeated.

It follows that the demurrer to the writ must be overruled, and it is so ordered. **DEMURRER OVERRULED.**

MR. JUSTICE EAKIN did not sit.

Denied January 18, 1916.

ON PETITION FOR REHEARING.

(154 Pac. 106.)

In Banc. **MR. JUSTICE BEAN** delivered the opinion of the court.

11. The petition for rehearing suggests a further ruling as to the working force of Chapter 339 of the Laws

of 1913, as amended by Chapter 337 of the Laws of 1915. The "state engineer" being substituted for the "state highway engineer" by the later act, there can be no question but that all the duties coming within the purview of the statute would devolve upon the state engineer, and for this reason the enactment of 1915 provides the assistance of a deputy for that official. It also subjects the state engineer to the duty of responding to the requisitions of the highway commission in the matter of the construction of state roads. These additional explanations cover all the interrogatories submitted by the petition, in so far as they pertain to the issues raised in this proceeding.

Other points are ably argued, but are not involved in the litigation, so as to authorize this court to adjudicate the same. With this explanation, a rehearing will be denied. DEMURRER OVERRULED. REHEARING DENIED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

INDEX.

(659)



INDEX.

ABANDONMENT.

See Contracts, 3.

ABATEMENT AND REVIVAL.

Abatement and Revival—Plea in Abatement—Waiver—Answering to Merits.

1. Where defendants, sued by a foreign corporation, filed a plea in abatement that the corporation had not complied with the statutes authorizing foreign corporations to transact business within the state, they did not waive such plea by answering and pleading to the merits when the plea was overruled. (*Weiser Land Co. v. Bohrer*, 202.)

ABSTRACT OF RECORD.

See Contempt, 2.

ACCOUNTING.

See Partnership, 1, 2.

ACCRETIONS.

See Navigable Waters, 3.

ACQUIESCENCE.

When Act will not Work an Estoppel.

See Contracts, 2.

ACTION.

See Bills and Notes, 5.

See Cancellation of Instruments, 1, 3.

See Carriers, 1.

See Courts, 1, 2.

See Master and Servant, 1, 3, 6-8, 10, 12, 17, 20.

See Partnership, 1, 2.

See Vendor and Purchaser, 4.

ADEQUATE REMEDY AT LAW.

See Instructions, 1.

ADMISSIONS.

See Evidence, 9.

See Pleading, 11.

ADULTERATION.

See Food, 1.

AFFIDAVIT.

Absence of Counter-affidavits on Motion to Change Venue.

See Venue, 1.

AGREEMENT.

See Attorney and Client, 2-4.

See Statute of Frauds, 1.

Effect of as to Alimony.

See Divorce, 2.

ALCOHOL.

See Food, 1, 3.

ALIMONY.

Effect of Agreement Between Parties.

See Divorce, 2.

AMENDMENT.

As Applied to Undertaking on Appeal.

See Appeal and Error, 2.

AMICUS CURIAE.

Amicus Curiae—Effect on Proceedings in Making Such Appearance.

1. In a *mandamus* proceeding in the Supreme Court, where briefs are filed, oral arguments made by counsel appearing as *amicus curiae* in the interest of the state highway commission, in which proceeding the duties devolving upon the state engineer are involved and sought to be regulated, the interest of the commission will be considered the same as if it had been made a party to the proceeding. (*Peterson v. Lewis*, 641.)

APPEAL AND ERROR.

Appeal and Error—Undertaking—Sufficiency.

1. Under Section 551, L. O. L., providing that the undertaking of the appellant shall be that appellant will pay all damages, costs and disbursements awarded against him, an undertaking, which limited the surety's liability to \$100 is insufficient. (*Sutton v. Sutton*, 9.)

Appeal and Error—Undertakings—Amendment.

2. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, so as to provide that, when a party in good faith gives due notice of an appeal, and thereafter omits through mistake to do anything, including the filing of an undertaking, the appellate court may permit an amendment, an appellant who in good faith tendered an undertaking which was insufficient should be allowed to amend and furnish the good undertaking. (*Sutton v. Sutton*, 9.)

Appeal and Error—Presentation of Grounds of Review in Court Below—Exceptions—Necessity.

3. Where the facts were all stipulated, no exception to the court's decision need be taken under Section 172, L. O. L., declaring that no exception need be taken to any decision upon a matter of law; the judgment being merely an application of the law to the facts. (*Grice v. Oregon-Wash. R. & N. Co.*, 17.)

Appeal and Error—Review—Questions of Fact.

4. Under Article VII, Section 3, of the Constitution providing that no fact tried by a jury shall be otherwise re-examined in any court

unless the court can affirmatively say there is no evidence to support the verdict, where the jury has decided a question of fact on conflicting testimony, the Supreme Court is neither required nor permitted to exercise its judgment in order to determine which assertion of the parties is true. (*Adams v. Corvallis & E. R. Co.*, 117.)

Appeal and Error—Review—Motion for Nonsuit—Evidence.

5. In the consideration of a motion for a nonsuit, where the record contains all the evidence produced upon the trial, the Supreme Court must consider the entire evidence. (*Taggart v. Hunter*, 139.)

Appeal and Error—Questions of Facts—Nonsuit.

6. Under Article VII, Section 3, of the Constitution, as amended in 1910 (see Laws 1911, p. 7), providing that no fact tried by a jury shall be otherwise re-examined in any court of the state, unless the court can affirmatively say there is no evidence to support the verdict, where the Supreme Court cannot say that there was no competent evidence to support a verdict, it cannot hold error in overruling a motion for a nonsuit or a directed verdict. (*Taggart v. Hunter*, 139.)

Appeal and Error—Reservation of Grounds of Review—Objection to Evidence.

7. Where testimony was excluded, but no offer was made to have it taken and incorporated in the record, subject to the objection, the objection could not be urged on appeal. (*Peterson v. Thompson*, 158.)

Appeal and Error—Right to Review—Persons Entitled.

8. Where a proceeding to escheat property has been decided adversely to the state because of the existence of heirs, one who has been made defendant on his own request, and who has unsuccessfully sought to establish a deed to the premises from decedent to himself, but who has joined no issue with the heirs, cannot maintain an appeal, the interest of the state having ceased, and the right of the heirs not having been attacked. (*State v. Butts*, 173.)

Appeal and Error—Transcript—Dismissal.

9. Under Section 554, L. O. L., as amended by Laws of 1913, page 618, providing that appellant, within 30 days after perfecting his appeal, shall file in the appellate court a transcript of such an abstract as the rules of that court may require, or so much of the record as is necessary to intelligibly present the questions to be determined by that court, the original files in the court below, without any certificate identifying them, and without an abstract as required by Supreme Court rule 6 (117 Pac. ix), or any explanation for failure in that regard, filed on appeal from an order of the Circuit Court after notice of appeal was served and filed, did not constitute the transcript required on appeal, and the appeal would be dismissed. (*Mitchell v. Sturtevant*, 214.)

Appeal and Error—Notice of Appeal—Persons upon Whom Notice Should be Served—"Adverse Party."

10. In a suit to foreclose laborers' liens on mining claims, plaintiff named as defendants, in addition to the owner and a lessee of the claims, parties alleged to have liens thereon subsequent in time and right to plaintiff's claim, one of whom answered, denying some of the averments of the complaint and asking the foreclosure of his

lien. On motion of the owner of the claims, the court struck out all of the items alleged in the complaint, and plaintiff appealed from the decree, but served his notice of appeal on none of the defendants except such owner. *Held* that, under Section 550, L. O. L., providing that if an appeal is not taken at the time of the decision, order, judgment or decree is rendered or given, the party desiring to appeal may cause a notice to be served on such adverse party or parties as have appeared, the Supreme Court did not acquire jurisdiction of the appeal, since an "adverse party," within the statute, is every party to an action, suit or proceeding whose interest in respect to the final determination rendered therein is or might be in conflict with a modification or reversal of the decision, order, judgment or decree. (*Barton v. Young*, 215.)

Appeal and Error—Harmless Error—Challenges to Jurors.

11. Where the court wrongfully overrules a challenge to a juror for cause, but the objecting party peremptorily challenges such juror, the error was cured. (*Twitchell v. Thompson*, 285.)

Appeal and Error—Proper Showing to Complete Transcript Allowed.

12. Where it is shown that failure to complete transcript was on account of sickness, and want of assistance in transcribing shorthand notes of the evidence, a rule on the clerk of the lower court will be made to supply the omission under Section 555, L. O. L., and the appeal will not be dismissed for insufficient transcript. (*Oberlin v. Oregon-Wash. R. & N. Co.*, 301.)

Appeal and Error—Review—Question of Fact—Constitutional Provision.

13. In an action for injury to a third person, from defendant's automobile operated by its regular driver, a verdict that it was being used in the employer's business cannot be disturbed in view of the Constitution as amended in 1910 by the adoption of Article VII, Section 3 (see Laws of 1911, p. 7), providing that no fact tried by a jury shall be re-examined, unless the court can affirmatively say there is no evidence to support it. (*Kahn v. Home Tel. & Tel. Co.*, 308.)

Appeal and Error—Review—Argument of Counsel—Request for Charge.

14. An argument for plaintiff that the poor needed the protection of the golden rule more than men of the class of defendant's counsel and its well-fed manager, to which objection was sustained, without request for an instruction to disregard it, will not be considered on appeal. (*Kahn v. Home Tel. & Tel. Co.*, 308.)

Appeal and Error—Review—Exception—Argument of Counsel.

15. Alleged improper argument of counsel, not made a part of the bill of exceptions, will not be considered on appeal. (*Kahn v. Home Tel. & Tel. Co.*, 308.)

Appeal and Error—Record—Certification.

16. Documents not certified by the judge as having been received or offered in evidence at the trial cannot be considered on appeal, though certified by the clerk below and filed in the appellate court. (*State v. Rider*, 318.)

Appeal and Error—Record—Questions Presented.

17. In the absence of a bill of exceptions, the only question to be considered on appeal is whether the findings of fact support the judgment. (*State v. Rider*, 318.)

Appeal and Error—Modification of Judgment.

18. Under Section 346, L. O. L., making one cutting or carrying off trees from the land of another without lawful authority liable for treble the amount of damages claimed or assessed, the burden was on plaintiff to prove the willfulness of the trespass, and to show by a preponderance of the evidence that all sums in excess of the actual damages were recoverable, and where there was no proof of the trespass, except as it might be inferred from his ownership of the premises and the cutting and removal, a judgment for treble damages would be remitted. (*McHargue v. Calchina*, 326.)

Appeal and Error—Question of Fact—Findings—Conclusiveness.

19. While the findings of the circuit judge are not binding on the appeal of a suit in equity, they are not without weight, especially when the evidence in the record is conflicting. (*Goff v. Kelsey*, 337.)

Appeal and Error—Review—Finding on Conflicting Evidence.

20. A jury's finding on substantial conflicting evidence cannot be questioned on appeal. (*Spain v. Oregon-Wash. E. & N. Co.*, 355.)

Appeal and Error—Change of Venue—Bias of Judge.

21. Where before the trial of a cause the judge makes statements amounting to a prejudgment of the case in favor of the plaintiff, the defendant is entitled to a change of venue, and for the error in refusing to grant the change, the judgment will be reversed on appeal, though the record fails to disclose any prejudice in the trial. (*Rugenstein v. Ottenheimer*, 371.)

Appeal and Error—Former Decision as Law of the Case.

22. The law as enunciated by the court on appeal as applicable to a given case remains the law of that case for all future proceedings. (*Rugenstein v. Ottenheimer*, 371.)

Appeal and Error—Harmless Error—Pleading—Election.

23. In a servant's action for personal injury, where the complaint asserted the cause of action in four ways differing in respect to the machinery, whether it was in motion or was started after plaintiff commenced work, and as to the protection of the cogwheels, and the defendant before trial moved that plaintiff be required to elect, that the court required him to elect only after the close of plaintiff's evidence was not prejudicial to defendant. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Appeal and Error—Harmless Error—Admission of Evidence.

24. In a servant's action for injury, where it appeared that he was 21 years of age, and where the complaint alleged that he was capable of earning \$2 per day by manual labor, \$50 per month as a stenographer, that he was a graduate of a university, and upon completion of his electrical course might earn from \$3,000 to \$10,000 a year, temporary admission of evidence tending to show the salary of a mechanical engineer to be \$3,000 per year and over was not prejudicial to defendant, in view of an instruction not to consider

what plaintiff might earn after education for a profession. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Appeal and Error—Receivers—Settlement of Accounts—Jurisdiction Pending Appeal.

25. After parties appealing from an order appointing a receiver, had filed a *supersedeas* bond, staying all proceedings in the court below, that court, pending the appeal, was without power to hear and settle the receiver's report; though where leave had been granted on the former appeal to present the question of the compensation of the expert accountants, and such items had been paid by the receiver, the proper time for their investigation was upon the hearing and settlement of the receiver's report and final account. (*Henderson v. Tillamook Hotel Co.*, 444.)

Appeal and Error—When Admission of Immaterial Evidence is Harmless.

25a. In an action to recover damages for breach of a contract in which Y. agreed to sell and deliver "25,000# of 1913 hops at 14 cents per pound," the admission of immaterial testimony as to the custom of hop buyers in the use of the hieroglyphic, #, was harmless. (*Schucking v. Young*, 483.)

Appeal and Error—Effect of Evidence is Question for the Jury.

25b. Competent evidence, its credibility and effect, is a question for the jury to determine. (*Riddle State Bank v. Link*, 498.)

Appeal and Error—Sufficiency of Undertaking on Appeal.

26. Section 551, L. O. L., provides that the undertaking of the appellant shall be given with one or more sureties to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings, unless the undertaking further provides as follows: (1) If the judgment or decree appealed from be for the recovery of money, or of personal property or the value thereof, and if the same or any part thereof be affirmed, the appellant will satisfy it so far as affirmed; an undertaking literally complying with the statute was not insufficient because it failed to state to whom appellant would pay any amount adjudged to be due upon it. (*Metzler Lbr. Co. v. Farmers' Mercantile Co.*, 551.)

Appeal and Error—Only Matters in Bill of Exceptions or the Record Presented for Review.

27. During the pendency of an action plaintiff made an assignment for the benefit of its creditors and the assignee was substituted in its place. No mention is made in the bill of exceptions or the abstract of record of such substitution, neither does it appear that defendant made any objections or opposed the substitution of said assignee or raised the question in any way in the Circuit Court; therefore the contention now urged by defendant that such assignment and the substitution of the assignee in lieu of plaintiff ousted the court of jurisdiction could not be considered. (*Metzler Lbr. Co. v. Farmers' Mercantile Co.*, 551.)

Appeal and Error—Matters Presented for Review by the Record.

28. In an action by a lumber company to recover the purchase price of material, which defendant contends was furnished to a con-

tractor and not to defendant, testimony was introduced showing that one Eblin, a contractor, was constructing the building, and that an undertaking given by him in connection with said contract was signed by Metzler & Hegsted. *Held* that, in the absence of any pleading showing that plaintiff signed said undertaking, and that it contained terms inconsistent with the present contention of plaintiff, and in the absence of the undertaking from the record, the contention of defendant that plaintiff could not recover because it executed the contractor's bond could not be considered. (*Metzler Lbr. Co. v. Farmers' Mercantile Co.*, 551.)

Appeal and Error—When the Order of Introducing Proof will be Considered Harmless.

29. Where testimony was admitted in rebuttal that might have been introduced in chief, defendant's rights were not abused where it had an opportunity to and did oppose the testimony when thus offered. (*Metzler Lbr. Co. v. Farmers' Mercantile Co.*, 551.)

Appeal and Error—Rights not Affected Appeal will be Affirmed.

30. When the court cannot say that the rights of the appellant have been substantially affected, the appeal will be affirmed in view of Section 556, L. O. L., providing upon an appeal from a judgment the same shall only be reviewed as to questions of law appearing substantially affecting the rights of the appellant. (*Metzler Lbr. Co. v. Farmers' Mercantile Co.*, 551.)

Appeal and Error—Mistake in Entering Judgment Corrected by Motion in Lower Court.

31. Where in an action of replevin it appeared that the bond demanded had been sold and a new one issued in lieu thereof, and the canceled bond No. 232, series No. 1, of the Realty Associates of Portland, having been received in evidence, its number and series were entered in the judgment for plaintiff, and the judgment further provided that in case a return of said bond could not be had, then for the recovery of \$850, the value thereof, and defendant failed to move to correct the judgment in this respect, such mistake is unavailing on appeal, for the reason that the proper way to correct an error in a judgment entry in replevin is by motion in the court in which it was rendered, and not by appeal. (*Reed v. Mills*, 558.)

See Contempt, 1-4.

ASSESSMENT.

See Municipal Corporations, 1-3, 6, 7.

ASSIGNMENT OF ERRORS.

See Contempt, 3.

ASSIGNMENTS.

Assignments—Validity of Assignments.

1. A mere litigious right cannot be assigned; consequently one purchaser of land cannot assign to another the right to sue for a rescission of the contract. (*Cooper v. Hillsboro Garden Tracts*, 74.)

Assignments—Contracts.

2. Where purchasers of land assigned their contracts to plaintiff, the assignment was an affirmance of the agreement, and so precluded

suit by plaintiff for rescission of the contracts on the ground of misrepresentations; plaintiff having no more rights than his assignors. (*Cooper v. Hillsboro Garden Tracts*, 74.)

ASSUMPTION OF RISK.

See Master and Servant, 11-15, 19.

ATTACHMENT.

Attachment—Writ of Attachment—Force and Effect.

1. Under Section 298, L. O. L., providing that a writ of attachment shall be directed to the sheriff of any county in which property of the defendant may be, and that several writs may be issued at the same time to the sheriffs of different counties, a writ of attachment directed to a particular sheriff is of no force or effect outside of his county. (*Edwards v. Case*, 220.)

ATTORNEY AND CLIENT.

Attorney and Client—Transactions—Validity.

1. In view of Section 561, L. O. L., declaring that the measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties, an agreement as to compensation between attorneys and one who desired to retain them, made before the relation of attorney and client existed, cannot be repudiated because of the subsequent confidential relation. (*Hansel v. Norblad*, 38.)

Attorney and Client—Agreements—Validity.

2. After the relation of attorney and client is established, an agreement between the attorney and his client is binding, if the client knows all the facts and is fully advised as to the situation. (*Hansel v. Norblad*, 38.)

Attorney and Client—Agreements—Compensation.

3. An agreement by one accused of murder to pay each of the two attorneys retained to represent him \$1,000 does not show that the fee is so excessive as to impute fraud to the attorneys. (*Hansel v. Norblad*, 38.)

Attorney and Client—Compensation—Agreements—Validity.

4. In a suit to set aside conveyances made to secure counsel their fees in defending a murderer, in view of Section 2385, L. O. L., which made the costs recoverable by the state a prior lien, evidence of the value of the property and the liens on it held not to show that the instruments were procured by fraud. (*Hansel v. Norblad*, 38.)

Attorney and Client—Right of Client to Compromise Prior to Judgment.

5. An attorney has no lien for his services prior to the entry of judgment or decree, and in the absence of fraud, a compromise made by the client before judgment or decree without the attorney's consent will be upheld. (Citing *Stearns v. Wollenberg*, 51 Or. 88, 92 [92 Pac. 1079, 1080, 14 L. R. A. (N. S.) 1095].) (*Campbell's Gas Burner Co. v. Hammer*, 612.)

See Appeal and Error, 14, 15.

See Mortgages, 9.

See Trial, 1.

AUTHENTICATION.

See Appeal and Error, 16.

When Allowed to Supply Certificate to Transcript.

See Contempt, 4.

AUTHORITY.

See Principal and Agent, 1.

See Statute of Frauds, 1.

AUTOMOBILES.

See Municipal Corporations, 5.

BAR.

See Judgment, 9.

BIAS.

See Appeal and Error, 21.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

Bills and Notes—Indorser's Liability—Statute.

1. Under Section 5899, L. O. L., providing that every indorser without qualification warrants to all subsequent holders in due course that the indorsement is genuine and in all respects what it purports to be, that he has good title to it, that all prior parties had capacity to contract, and that the instrument is at the time of his indorsement valid and subsisting, and providing that, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it, where defendants indorsed a mortgage note without qualification, they were liable thereon, unless the note had been previously paid or otherwise satisfied. (Peterson v. Thompson, 158.)

Bills and Notes—Payment—Burden of Proof.

2. Payment being an affirmative defense, in suit to foreclose a mortgage, seeking a personal judgment against indorsers of the mortgage note, it was incumbent on such indorsers to prove payment by the preponderance of the evidence. (Peterson v. Thompson, 158.)

Bills and Notes—Mortgage Note—Liability of Indorsers—Sale of Equity of Redemption.

3. Where the sale of mortgaged premises by the administrator of the deceased mortgagor, in effect, conveyed the equity of redemption remaining in the estate of the maker, such sale, while it exhausted the estate, did not discharge its liability on the note, and the indorsers on such note were not discharged. (Peterson v. Thompson, 158.)

Bills and Notes—Irrigation Project—Contract—Fraudulent Representations.

4. An irrigation corporation, formed by owners of arid lands, contracted with a contractor to construct an irrigation system in

accordance with plans. The contractor agreed to receive payment in notes and mortgages given by the land owners. A land owner executed a note and mortgage on the representation that 55 acres of her 56.12 acres would be irrigated. Under a subsequent contract and plans, only 44 acres could be irrigated, and she refused to execute a new note and mortgage therefor. The corporation knew of the refusal before any work was done by the contractor who performed the subsequent contract. *Held*, that because of the representation, there could be no recovery on the note and mortgage at the suit of the corporation. (*Kingman Colony Irr. Co. v. Payne*, 238.)

Bills and Notes—Action on Note—Complaint—Surplusage.

5. Where a copy of the note on which suit was based was attached to the complaint as an exhibit, allegations in the complaint as to the legal effect of the instrument are surplusage, and should be disregarded; it being the duty of the court to determine the instrument's effect from its averments. (*Somers v. Hanson*, 429.)

See Principal and Agent, 4.

BOUNDARIES.

See Schools and School Districts, 6.

BREACH OF CONTRACT.

See Contracts, 7.

See Sales, 5-7.

Breach of Agreement to Pay Debt of Another.

See Contracts, 6.

BREACH OF WARRANTY.

See Covenants, 2, 3.

BROKERS.

Brokers—Compensation—Statute of Frauds—Sufficiency of Memorandum.

1. Under Section 808, subdivision 8, L. O. L., providing that an agreement authorizing or employing an agent or broker to sell real estate for compensation or a commission shall be void unless it, or some memorandum thereof, expressing the consideration, be in writing, subscribed by the party to be charged or by his lawfully authorized agent, and that evidence of the agreement shall not be received other than the writing or secondary evidence of its contents, a parol contract definite enough to be enforced is enforceable if reduced to writing and signed by the party to be charged; and a lost written agreement of employment which, as established, named the principal, mentioned the agent, described the land, stated the price for which it was to be sold, and authorized the agent to sell the land, subscribed by the principal, though not expressing any compensation to be paid the agent, when accepted and acted upon by procuring a purchaser, was a binding contract. (*Taggart v. Hunter*, 139.)

Brokers—Contracts—Compensation.

2. Under a broker's employment to find a purchaser of land for a commission, where the compensation was not stated therein, the law implied an agreement to pay what it was reasonably worth. (*Taggart v. Hunter*, 139.)

Brokers — Compensation — Statute of Frauds — Sufficiency of Memorandum.

3. Under Section 808, L. O. L., declaring void certain agreements, including one authorizing or employing an agent or broker to sell real estate for compensation or a commission, unless the same, or a memorandum thereof, expressing the considerations, be in writing, and subscribed by the party to be charged, the written authorization to a broker to sell real estate must state the compensation to be paid him. (*Taggart v. Hunter*, 139.)

Brokers—Contract to Compensate Loan Brokers for Procuring Loan.

4. Plaintiffs and defendant executed an agreement in writing wherein plaintiffs were to procure a loan of \$5,500 for term of 5 years, with an option of paying \$1,000 per year, or the whole amount in 3 years, at 8 per cent secured by first mortgage on the farm owned by defendant, for which defendant agreed to pay plaintiffs \$220, and further agreed that if for any reason defendant was unable or unwilling to close said loan, he agreed to pay the said \$220 to plaintiffs for their services. Plaintiffs promptly procured the loan and performed all the conditions of such agreement, and defendant refused to execute the mortgage as agreed, and plaintiffs thereupon brought this action to recover the \$220 agreed on as their compensation. Defendant alleged in his answer that the contract was to become void in case the mortgagee should refuse to cancel his mortgage, in order that a first lien could be given on the land; that said mortgagee refused to release his lien, and plaintiffs were promptly notified of such fact. In view of the record that no testimony was offered tending to show the legal delivery of such agreements to plaintiffs, or facts from which a valid possession of the contract could be inferred, held that the verdict of the jury in favor of defendant and the judgment rendered thereon would not be disturbed. (Citing *Hoag v. Washington-Oregon Corporation*, 75 Or. 588 [147 Pac. 756].) (*Miller v. Weaver*, 594.)

BUILDING CONTRACTS.

See Contracts, 1, 2.

See Schools and School Districts, 7.

BURDEN OF PROOF.

See Bills and Notes, 2.

See Carriers, 1.

See Master and Servant, 6, 8, 16.

CANCELLATION OF INSTRUMENTS.**Cancellation of Instruments—Actions—Averments of Fraud.**

1. In a suit to set aside conveyances as procured by fraud and undue influence, the facts showing the fraud must be alleged, and bare averments that the transaction was carried out fraudulently, willfully and by false pretenses is not enough. (*Hansel v. Norblad*, 38.)

Cancellation of Instruments—Complaint.

2. A complaint, seeking rescission of a contract for the purchase of land, which averred that plaintiff was induced to purchase by means

of false representations, and recited the various false representations made, is sufficient where not attacked by demurrer. (*Marshall v. Hillsboro Garden Tracts*, 89.)

Cancellation of Instruments—Actions—Evidence.

3. In a suit for rescission of a contract for the purchase of land on the ground of misrepresentations, relief cannot be afforded on account of misrepresentations not set up in the complaint. (*Henrickson v. Hillsboro Garden Tracts*, 96.)

CANDY.

See Food, 1, 3.

CARRIERS.

Carriers—Carriage of Goods—Action—Burden of Proof.

1. A carrier, seeking to reduce its liability for goods lost in transit, must allege and prove facts entitling it to the reduction. (*Grice v. Oregon-Wash. R. & N. Co.*, 17.)

Carriers—Carriage of Goods—Liability—Stipulation.

2. A bill of lading provided that the amount of any loss or damage for which the carrier was liable should be computed upon the basis of the value of the property, being the *bona fide* invoice price, unless a lower value had been represented in writing by the shipper, or agreed upon, or is determined by the classification or tariff upon which the rate was based. A carrier lost goods delivered under such a bill. Neither the bill of lading nor the statement of facts on which the cause was tried showed the valuation of the property. The statement of facts failed to show that a value lower than the invoice price had been represented by the shipper, or that a lower value had been agreed upon, or the value as determined by the classification or tariff upon which the rate was based. *Held* that, as none of these matters were disclosed by the pleadings or statement of facts, the carrier was liable for the actual value of the goods under the common-law rule. (*Grice v. Oregon-Wash. R. & N. Co.*, 17.)

Regulations of and Liabilities of Carriers.

See Commerce, 1.

Arrest of Passenger by Conductor.

See False Imprisonment, 1.

CASES IN THE OREGON REPORTS.

Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume.

See Table in Front of this Volume.

CHARTER OF CITIES.

La Grande—*Birney v. La Grande*, 531.

CHATTEL MORTGAGES.

Chattel Mortgages—Foreclosure—Sales.

1. Where personal property, subject to a mortgage to secure rent, was sold by a receiver under foreclosure and bid in by the

lessor at the full amount of the mortgage, which exceeded the amount of the rent due, the lessor is liable to a subsequent chattel mortgagee for the overplus, and the sale will not, in an analogy to sales of real property, be set aside on the ground that the purchase price exceeded the value of the goods, for sales of personalty are not ordinarily subject to redemption. (*Northern Brewery Co. v. Princess Hotel*, 453.)

Chattel Mortgages—Rights of Mortgagee.

2. Where a note secured by chattel mortgage provided for attorney's fees in case of suit for collection, an attorney's fee allowed the holder cannot be recovered from one liable because having obtained property subject to the chattel mortgage. (*Northern Brewery Co. v. Princess Hotel*, 453.)

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charter of Cities.

CITY ORDINANCES.

See Municipal Corporations.

CLAIM AND DELIVERY.

See Appeal and Error, 31.

See Replevin, 1-4.

CODE CITATIONS.

See Table in Front of this Volume.

COLLATERAL ATTACK.

See Executors and Administrators, 1, 6.

COLLATERAL SECURITY.

See Pledges, 1, 6.

COMMERCE.

Commerce—Interstate Commerce—Regulations—Liability of Carriers.

1. The interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 379), which was designed to prevent preferences, does not prohibit a carrier from assuming the common-law liability in carrying goods from one state to another. (*Grice v. Oregon-Wash. R. & N. Co.*, 17.)

COMMERCIAL PAPER.

See Bills and Notes.

COMPENSATION.

See Attorney and Client, 3, 4.

See Brokers, 1-3.

78 Or.—43

CONCLUSIVENESS.

See Appeal and Error, 19.
See Judgment, 4, 5, 11, 12.

CONDITIONAL SALES.

See Contracts, 8.
See Mortgages, 8.
See Sales, 1, 2.

CONFIRMATION.

See Receivers, 2.

CONSIDERATION.

See Statute of Frauds, 3.

CONSTITUTIONAL LAW.**Constitutional Law—Legislative Powers.**

1. The legislature is invested with legislative power to the fullest extent except so far as limited expressly or by necessary implication in the state and federal Constitutions, and in considering the constitutionality of an act the question is not as to the extent of the power delegated by the people to the legislative assembly, but as to the extent of the limitations the people have imposed upon that body. (*State v. School Dist. No. 3*, 188.)

Constitutional Law—Due Process of Law—Priority of Liens.

2. A mortgagee, in a mortgage executed subsequent to the statute giving laborers and materialmen a preference, is not deprived of his property right without due process of law, because his lien is postponed to the liens of laborers and materialmen. (*Haines Commercial Co. v. Grabill*, 375.)

Constitutional Law—Act Creating State Industrial Accident Commission is Constitutional.

3. The act creating the State Industrial Accident Commission (Laws 1913, p. 188) is not in contravention of Article III, Section 1 of the state Constitution that provides as follows: "The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another." *In re Willow Creek*, 74 Or. 592, 610, 611 (144 Pac. 505), approved and followed. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

Constitutional Law—Judicial Powers Conferred by Constitutional Provision.

4. By force of the amendment to Article VII, Section 1, of the Constitution (Laws 1911, p. 7), the legislature was empowered and authorized to confer judicial powers upon the State Industrial Accident Commission under the workmen's compensation law, for the reason under this amendment either the legislature or the people have the right to confer judicial powers upon any tribunal it or they may select, *provided*, the executive, legislative and judicial departments of the state government are not blended so as to contravene Article III,

Section 1 of the Constitution. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

Constitutional Law—Right to Trial by Jury—Due Process of Law.

5. The Workmen's Compensation Act (Laws 1913, p. 188), establishing a system of voluntary accident insurance and creating the State Industrial Accident Commission to carry into effect its provisions, does not violate either Article I, Section 10, of the state Constitution, providing "No court shall be secret, but justice shall be administered openly * * and without delay, and every man shall have remedy by due process of law for injury done him in his person, property or reputation," or Section 1 of the Fourteenth Amendment to the United States Constitution, declaring " * * nor shall any state deprive any person of life, liberty or property, without due process of law, * * " for the reason that the act does not attempt to establish a court to try causes without a jury, neither does it compel employers and employees to adjust their grievances without their consent, for the act allows the employer an election to either accept or reject its provisions, and in case he rejects the act, he is left the right to protect himself from personal injury actions in the courts. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

Constitutional Law—Construction as to Constitutionality of Statute.

6. The rule is well settled in this state that a statute will not be held unconstitutional where a reasonable doubt exists as to its invalidity. (Citing *In re Willow Creek*, 74 Or. 592 (144 Pac. 505), and other Oregon cases.) (*Evanhoff v. State Industrial Acc. Com.*, 503.)

Constitutional Law—Power to Delegate Adoption of Charter to Council or Commissioners.

7. Under the Constitution of Oregon the legislature does not possess power to authorize a city council or commissioners to either adopt or amend city charters by ordinance, as that authority belongs to the legal voters of every city and town within the state. (Section 2, Article XI, Const.) (*Birnie v. La Grande*, 531.)

Constitutional Law—Legislative Power Cannot be Delegated.

8. Under Article IV, Section 1, of the Constitution, the attempt of the state highway commission to delegate the duties imposed by statute upon the state engineer is void and of no effect whatever, for the reason that legislative power cannot be delegated to a commission. (*Peterson v. Lewis*, 641.)

See Appeal and Error, 13.

See Schools and School Districts, 1-5.

See Statutes, 4.

CONSTITUTION OF OREGON.

Cited and Construed.

See Table in Front of this Volume.

CONSTRUCTION.

See Constitutional Law, 6.

See Contracts, 4, 5.

See Covenants, 1.

See Mandamus, 6.
 See Pleading, 5, 6.
 See Statutes, 3, 7.
 See Trial, 2.

CONTEMPT.

Contempt—Appeal—Bill of Exceptions.

1. Whether a sentence for contempt exceeds the limits fixed by statute, being determinable from an examination of the judgment as exemplified in the record, may be submitted on appeal without a bill of exceptions, even though other questions discussed in the brief could not be considered without the evidence and a bill of exceptions. (State v. Rider, 318.)

Contempt—Appeal—Record—Additional Abstract.

2. Where respondent deems the abstract imperfect or unfair, he should file an additional abstract, as prescribed by Supreme Court rule 7 (56 Or. 616 [117 Pac. x]). (State v. Rider, 318.)

Contempt—Appeal—Assignments of Error—Sufficiency.

3. That assignments of error in the abstract on appeal fall short of technical accuracy does not require a dismissal of the appeal, not essential to a transfer of the cause. (State v. Rider, 318.)

Contempt—Appeal—Transcript—Authentication.

4. Where defendant has attempted in good faith to comply with Laws of 1913, page 656, declaring that when an appeal is perfected the original pleadings and the original bill of exceptions shall be sent up by the clerk of the trial court and made a part of the transcript, he will be allowed to supply a certificate to meet the objection that the pleadings and papers sent up were not properly authenticated. (State v. Rider, 318.)

CONTRACTS.

Contracts—Performance—Sufficiency—Building Contracts.

1. Where a contract required a monthly statement of account "covering labor, materials," etc., used in a building, and that "all receipted vouchers" be turned over by the contractor to the owner, the contractor's failure to take vouchers for labor is failure to substantially perform the contract, and he cannot recover an alleged unpaid balance, although canceled checks are offered in lieu of vouchers to show the payments made for labor. (Camp & DuPuy v. Lauterman, 134.)

Contracts—Breach—Acquiescence—Injury.

2. Where plaintiff, a contractor, agreed to furnish to defendant owner vouchers for all labor and material claims paid, and he never secured such vouchers for labor, the fact that defendant was present when laborers were paid, saw that no vouchers were taken, and did not object, does not estop him from setting up the contract, since the plaintiff did not, by reason of such acts of defendant, alter his position to his injury. (Camp & DuPuy v. Lauterman, 134.)

Contracts—Irrigation Project—Abandonment.

3. The maker, after the plan of the work had been changed without her consent, and she had refused a request to execute a new

note and mortgage, to conform to the change, could assume an abandonment of the agreement as to her. (Kingman Colony Irr. Co. v. Payne, 238.)

Contracts—Irrigation—Construction.

4. An irrigation corporation formed by owners of arid lands contracted with a contractor to construct an irrigation system in accordance with plans, indicating that 55 acres of a tract of 56.12 acres of an owner would be irrigated. The owner executed a note and mortgage for her share of the cost. Subsequently a new agreement between the corporations and the contractor was made, whereby only 44 acres of the tract could be irrigated. The owner refused to give a new note and mortgage pursuant to the new agreement. The contractor constructed the system in accordance with the new agreement. The corporation knew of the owner's refusal before any work was done. *Held*, that the system constructed under the new agreement was materially different from the system called for by the original agreement, and the note and mortgage were not enforceable at the suit of the corporation. (Kingman Colony Irr. Co. v. Payne, 238.)

Contracts—Irrigation Works—Construction.

5. A contract for the construction for an improvement district of a pumping plant for irrigation purposes, which provides that no alteration shall be made in the work except on the written order of the engineer, stating the amount to be paid the contractor for the alteration, that the compensation shall be paid in money or at the option of the district in its coupon bonds previously authorized and issued, and that all coupons of the bonds due on a specified date shall be detached from the bonds and retained by the district and canceled, subject to additions or deductions for alterations, gives to the district the option to pay with bonds and permits the retention of coupons payable on the designated date, subject to additions or deductions, and the coupons constitute a fund applicable to the payment for extra work. (Cooley v. Snake River Imp. Co., 384.)

Contracts—Contract to Pay Debt of Another—Breach—Damage.

6. Where the buyer of a stock of groceries agreed with the seller to pay the latter's debt to a grain company, the seller cannot sue for breach thereof unless through his payment of the debt himself, voluntarily or by compulsion, he has incurred damage. (Hyde v. Kirkpatrick, 466.)

Contracts—Breach—Waiver of Tender of Performance or Ability to Perform Contract.

7. It is settled law that a declaration made by one of the contracting parties prior to the time fixed for the performance, that he will not comply with such contract, if not withdrawn, dispenses with any offer to perform by the other before bringing an action for breach of contract. (Schucking v. Young, 483.)

Contracts—Right to Enforce Although in Form a Conditional Sale.

8. Where purchasers had assumed payment of the note sued on, as a part of the purchase price of a sawmill and standing timber, bought from the payer of the note under an agreement of conditional sale that was taken in the name of L. only, as a matter of convenience, and

where the possession had not been given by the seller, such fact did not release W. and H. from liability on the note, where it was shown that all three buyers were jointly interested in the purchase of the property. (*Riddle State Bank v. Link*, 498.)

- See Assignments, 2.
- See Bills and Notes, 4.
- See Brokers, 2, 4.
- See Cancellation of Instruments, 3.
- See Corporations, 7, 8.
- See Evidence, 4, 11, 12.
- See Mandamus, 6.
- See Reformation of Instruments, 4, 5.
- See Schools and School Districts, 7, 9.
- See Specific Performance, 1-5.
- See Statute of Frauds, 4.
- See Vendor and Purchaser, 1-5.

CONTRIBUTORY NEGLIGENCE.

- See Master and Servant, 2, 9, 15, 18, 22.

CONVERSION.

- See Pledges, 1, 4.

CORPORATIONS.

Corporations—Foreign Corporations—Regulation—Declaration of Intention.

1. A foreign corporation, which purchases land in the state from a citizen of another state, has the deed recorded in the state, gives a mortgage, leases the property, contracts to sell a portion thereof, the formal papers and contracts being signed and executed in the other state, and holds and votes stock in a district improvement company organized in the state, is within Section 6727, L. O. L., requiring a foreign corporation to file a declaration of intention to engage in business with the state. (*Weiser Land Co. v. Bohrer*, 202.)

Corporations—Foreign Corporations—Regulation—Declaration of Intention.

2. A single isolated instance of dealing on the part of a foreign corporation is not within Section 6727, L. O. L., requiring such a corporation to file a declaration of intention to transact business within the state. (*Weiser Land Co. v. Bohrer*, 202.)

Corporations—Notice of Garnishment—Requisites—"Interest."

3. While a debt due from a corporation is undoubtedly an "interest" therein within Section 300, subdivision 3, L. O. L., providing that personal property other than that capable of manual delivery shall be attached by leaving a certified copy of the writ and a notice specifying the property attached, if the property be rights or shares in the stock of an association or corporation or interests or profits thereon, with such person or officer of such association or corporation as a summons is authorized to be served upon, and a lien is impressed upon such debt by leaving a notice specifying the property

attached with the person or officer upon whom a summons may be served, the notice must be addressed to the corporation, and not to such person or officer, and no lien on a debt due from a corporation was created by delivering to the corporation's attorney in fact a notice addressed to him. (Edwards v. Case, 220.)

Corporations—Foreign Corporations—Process—Statute.

4. Under Section 6726, L. O. L., requiring every foreign corporation before doing business in the state to execute a power of attorney and record it with the Secretary of State, empowering some resident, as its attorney in fact, to accept service of all process necessary to give complete jurisdiction to any court of the state, the appointment is made for the whole state; and in a servant's action for injury received in C. County, where the defendant's agent for process resided, service upon him there gave the Circuit Court of M. County jurisdiction, since jurisdiction of a foreign corporation may be obtained by the Circuit Court for any county by summons upon the resident agent, regardless of his residence or where the cause of action arose. (Ramaswamy v. Hammond Lumber Co., 407.)

Corporations—Foreign Corporations—Process.

5. Where a state prescribes the conditions upon which foreign corporations may do business and a method whereby its courts may acquire jurisdiction by process upon its designated agents, a corporation subsequently doing business in the state is deemed to consent to such conditions, and to be bound by the prescribed process. (Ramaswamy v. Hammond Lumber Co., 407.)

Corporations—Powers and Liabilities of Under Joint Ventures.

6. In the absence of a statute, a corporation cannot agree to enter into a partnership with a person, firm or other corporation, but may, under a joint venture with others, transact any business within the scope of its legitimate powers, and by reason thereof become liable on account of the fiduciary relation thus assumed, which relation is subject to dissolution, accounting and settlement in a court of equity in the same manner as all other cases of partnership. (Salem-Fairfield Telephone Assn. v. McMahan, 477.)

Corporations—Representation by Promoter—Rescission of Contract—Fraud.

7. Plaintiffs appointed as their agent, to sell land on commission, one whom they knew to be interested in promoting a corporation to buy lands for development purposes. They gave such promoter an option to buy the land at the regular selling price. The land was sold to the corporation, a portion of the purchase price being paid in cash and a mortgage executed by the corporation to plaintiffs for the balance. The corporation, on discovering the fraud, rescinded the purchase, tendered back a deed, and demanded repayment of the advance payment on the price. *Held*, in a suit to foreclose a mortgage, that defendant corporation was entitled to a cancellation of the note and mortgage and to a judgment for the amount paid on the purchase price. (Hall v. Catherine Creek Development Co., 565.)

Corporations—Promoter's Contract—Rescission—Laches.

8. The fact that defendant corporation did not rescind the contract for some months after the execution of the note and mortgage at

which time they received definite notice of the facts constituting the fraud did not constitute such laches as to preclude the assertion of the right to rescind in a foreclosure suit brought shortly after the discovery of the fraud. (*Hall v. Catherine Creek Development Co.*, 565.)

See Joint Adventures, 2.

COUNTY ROADS.

See Highways.

COURTS.

Courts—Local and Transitory Actions—Actions for Injuries to Real Property.

1. An action for trespass on real property being local, an action for an injury to real property in the State of Washington cannot be maintained in the courts of Oregon, especially in view of Section 42, L. O. L., providing that an action for injuries to real property shall be commenced and tried where the property is situated; this being a tacit recognition of the common-law rule as to this class of actions. (*Montesano Lbr. Co. v. Portland Iron Wks.*, 53.)

Courts—Local and Transitory Actions—Actions for Injuries to Real Property.

2. A complaint alleged that plaintiff owned a sawmill which it leased to certain parties who agreed to purchase and install certain machinery, tools, etc., and that the machinery, when so established, should become a part of the realty and the property of plaintiff; that for the purpose of complying with the lease the lessee's assignee purchased of defendant certain machinery, tools, etc.; that such machinery, tools, etc., were sold and delivered to the assignee, and by the assignee duly installed in the mill, and became a part thereof and affixed and attached thereto; that defendant entered upon such mill premises and tore down and dismembered the sawmill, and took therefrom such machinery, tools, etc., which were then necessary for the operation of the mill, and, having dismantled the mill and torn and taken therefrom a large amount of the machinery, tools, etc., took away all such machinery, tools, etc.; that by such action the sawmill and sawmill plant was made useless and worthless, and it had become impossible to operate it; that the machinery, tools, etc., which defendant left in the mill were useless and practically without value; and that by the wrongful and unlawful action of the defendant plaintiff had been damaged in the sum of \$10,000. There was no allegation that the machinery carried away was of any particular value, but it was incidentally stated that it was of great value. Plaintiff introduced testimony as to the effect generally upon the mill of the removal of the machinery, and that defendant cut out some of the frames and timbers, tore up the mill in a general way, and nearly destroyed it so far as operating was concerned. *Held*, that the complaint stated a cause of action for an injury to real property within the rule that such actions are local, and not a cause of action to recover the value of personal property taken and converted by defendant, and, moreover, the action was tried as one for trespass to real property. (*Montesano Lbr. Co. v. Portland Iron Wks.*, 53.)

Courts—Jurisdiction—Waiver by Failure to Demur.

3. Under Section 72, L. O. L., providing that, if no objection be taken either by demurrer or answer, defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state a cause of action, an objection to the court's jurisdiction of an action for injuries to real property in another state was not waived by the failure to demur to the complaint, but might be raised at any time. (*Montesano Lbr. Co. v. Portland Iron Wks.*, 53.)

Courts—Jurisdiction—"Circuit Court."

4. Under the constitutional provision investing the Circuit Courts with general jurisdiction to be defined, limited and regulated by law, such courts are common-law courts, and any extraordinary jurisdiction not in the course of the common law must come from either the Constitution or the statutes. (*Montesano Lbr. Co. v. Portland Iron Wks.*, 53.)

COVENANTS.

Covenants—Construction.

1. Though a land owner imposed restrictive covenants on most of the parcels sold, that did not show a scheme to generally impose restrictions on all his property, and a grantee who took subject to restrictions cannot enforce similar restrictions against the remaining property of the vendor or against one who purchased without restriction. (*Roberts v. Lombard*, 100.)

Covenants—Breach of Warranty—Area of Premises.

2. A grantor by warranty deed, who had previously conveyed a strip over the granted premises, used as a county highway, was liable for a breach of his covenant of general warranty. (*McHargue v. Calchina*, 326.)

Covenants—Breach of Warranty—Damages.

3. In such case, where the grantee sustained a substantial loss in area by reason of an easement of a public way through the premises conveyed, the detriment was sufficient to authorize his recovery of more than nominal damages. (*McHargue v. Calchina*, 326.)

See Landlord and Tenant, 1, 2.

CROSS-EXAMINATION.

See Witnesses, 1, 2.

CUSTODY.

See Habeas Corpus, 1.

See Infants, 1, 2.

DAMAGES.

Damages—Instruction—Assessment of Damages.

1. In an action for damages for personal injuries, it is error to instruct that the jury may award such damages as they think plaintiff is entitled to recover; the correct rule of recovery being such an amount, if anything, as is established by a preponderance of the evidence. (*Rugenstein v. Ottenheimer*, 371.)

See Contracts, 6.

See Covenants, 3.
See False Imprisonment, 4.
See Trespass, 1.
See Waters and Watercourses, 5.

DECLARATIONS.

See Evidence, 6, 7.

DECREE.

Should Conform to Pleadings and Proof.

See Divorce, 1.

DEEDS.

Deeds—Evidence—Sufficiency.

1. In a suit to set aside conveyances, evidence *held* insufficient to show that at the time of the conveyance the grantor was incompetent. (Hansel v. Norblad, 38.)

A Deed Absolute on Its Face, as a Mortgage.

See Mortgages, 1, 3-6.

DEFEASANCE.

See Mortgages, 4, 5.

DEFINITIONS.

See Words and Phrases.

DELEGATION OF POWER.

See Constitutional Law, 7, 8.

DEMAND.

See Mandamus, 3.

DEMURRER.

See Pleading, 3, 6.

DISCHARGE.

See Execution, 1-3.

DISCRETION OF COURT.

See Judgment, 10.

See Pleading, 3.

DISMISSAL.

See Appeal and Error, 9.

See Nonsuit.

DISSOLUTION.

See Schools and School Districts, 1-5.

DITCHES.

See Waters and Watercourses, 4, 5.

DIVORCE.

Divorce—Decree—Conformity to Pleadings and Proof.

1. In a suit for divorce the ownership of a photograph of a deceased child of the parties was not made an issue by the pleadings or mentioned in the evidence, but just prior to the close of the trial the husband's attorney stated that the wife had two identical large photographs, one of which was the husband's property, and asked that the decree require her to turn one of them over to the husband. The wife's attorney admitted that the wife had possession of such photographs, and stated that he would advise her to turn one of them over to the husband, and that he did not deem it necessary to insert a provision in the decree. On the settlement of the findings and conclusions the wife's attorney stated that the wife refused to turn over either of the photographs to the husband. *Held*, that the court was without authority to provide in the decree that the wife should deliver one of such photographs to the husband, as, assuming that her attorney had a right to bind her by an admission, he made no admission as to the husband's ownership, and, moreover, ample notice of the wife's position was given before the formal decision and decree were entered. (*Sutton v. Sutton*, 9.)

Divorce—Alimony—Agreements of Parties—Effect.

2. In a divorce suit the husband, pursuant to an agreement, stipulated to transfer his personal property and convey his real estate to a trustee, who was empowered to sell it according to his own judgment, pay a mortgage thereon, satisfy certain debts of the husband, and deliver the balance, if any, to the wife. The mortgage was foreclosed, so that the trustee was practically shorn of his power, and the wife derived no benefit from the transfer to the trustee. *Held*, that she was not barred by the agreement from claiming alimony. (*Sutton v. Sutton*, 9.)

DOCUMENTARY EVIDENCE.

See Evidence, 11, 12, 14.

DOWER.

Effect on Dower of Administrator's Sale to Pay Debts.

See Executors and Administrators, 4.

DUE PROCESS OF LAW.

See Constitutional Law, 2, 5.

EASEMENTS.

See Highways, 1.

ELECTION.

See Appeal and Error, 23.

See Pledges, 3.

EMPLOYER'S LIABILITY ACT.

See Master and Servant, 18, 19, 21, 23.

EQUITY.**Equity—Trial—Exclusion of Evidence.**

1. Under Section 405, L. O. L., providing, relative to suits in equity that where evidence is offered and excluded, the party offering it shall be entitled to have it taken down in like manner as the testimony admitted, and that he shall be required to pay for taking it, unless the court on appeal holds it competent, where the court refused to hear evidence as to certain matters, but, when counsel stated that they had two witnesses who would not take over five minutes apiece, directed them to be called, and the party offering the testimony did not request permission to take any testimony over the ruling of the court, or offer to pay for the recording of such testimony, there was no error. (*Sutton v. Sutton*, 9.)

Equity—Jurisdiction Over Trusts.

2. Courts of equity have jurisdiction over all trusts for the purpose of compelling an accounting and settlement, and the existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction whenever the duty rests upon one party to render an account to the other, and in the absence of statute, equity has exclusive jurisdiction for the dissolution and settlement of partnerships. (*Campbell's Gas Burner Co. v. Hammer*, 612.)

Equity—Remedy at Law must be Full, Adequate and Efficient to Defeat Suit.

3. In order to defeat the jurisdiction of a court of equity, the remedy at law must be as full, adequate, complete and as efficient as the equity court. (*Campbell's Gas Burner Co. v. Hammer*, 612.)

See Reformation of Instruments, 5.

ESCHEAT.

See Appeal and Error, 8.

ESTOPPEL.**Estoppel—Persons Liable for Purchase Price.**

1. In an action for the purchase price of lumber, the fact that plaintiff's president knew that a contractor was erecting the building for which the lumber was furnished, and that he, either as such president or as a member of the firm furnishing the lumber, signed the contractor's bond, *held* not to estop plaintiff from seeking to charge defendant as purchaser of the material so furnished. (*Metzler Lbr. Co. v. Farmers' Mercantile Co.*, 551.)

See Judgment, 6, 7.

EVICTION.

See Landlord and Tenant, 3.

EVIDENCE.**Evidence—Parol Evidence Rule.**

1. Section 713, L. O. L., declaring that when the terms of an agreement have been reduced to writing by the parties, it is to be con-

sidered as containing all those terms, and therefore there can be no evidence of the agreement other than the contents of the writing, except where a mistake is in issue, or the validity of the agreement is in dispute, plaintiff, who entered into a contract for the purchase of land, and received a conveyance, cannot, where neither the memorandum of purchase nor the conveyance referred to restrictions upon the grantor's other property, introduce, in the absence of fraud, evidence of a parol agreement by the grantor that his other property in the vicinity should be subjected to the same building restrictions as that acquired by plaintiff. (*Roberts v. Lombard*, 100.)

Evidence—Expert Testimony—Questions for Jury.

2. In an employee's action for injuries sustained while assisting in removing lumber from a car, and claimed to have been due to the dangerous method of doing the work adopted by the employer, the question as to the manner of removing the lumber from the car was one of common experience and knowledge which the court was warranted in submitting to the jury, and was not one upon which the testimony of experts was required to aid the jury in passing upon the question at issue. (*Adams v. Corvallis & E. R. Co.*, 117.)

Evidence—Secondary Evidence—Contents of Writing.

3. In an action to recover a broker's commission on a sale of land, wherein plaintiff testified that defendants gave him a written agreement of employment in the form of a letter, in response to a conversation between himself and defendant, and containing the substance of and confirming it, which writing had been lost, plaintiff's testimony as to such conversation was admissible, as being merely a statement of the contents of the writing. (*Taggard v. Hunter*, 139.)

Evidence—Parol Evidence—Writing not Embodying Entire Agreement.

4. Plaintiff purchased a second-hand automobile for his grocery business, which defendant represented had been repaired and to be in good condition, and, at the conclusion of the sale, and on request for a receipt, was given a blank sale form, which he signed, and which provided that there were no agreements or representations not expressed therein, but which was not filled out as though intended to be a contract between the parties, and which referred to "the goods hereby ordered," and stated, "This order is not binding upon you [*Oregon Motor Car Company*] until accepted in writing signed by —," and which contained nothing bearing on the transaction, except the words "One Maxwell, \$400.00," and "Deposit, \$400.00." At the trial the president of defendant company and its witnesses testified to certain representations, none of which were found in the writing. *Held*, that plaintiff might show by parol evidence the circumstances of the contract of sale, the defendant's representations, the kind of machine intended to be purchased, and defendant's warranty, since for a writing to be within the parol evidence rule it must be the final repository of the entire agreement. (*Bouchet v. Oregon Motor Car Co.*, 230.)

Evidence—Presumptions—Judicial Actions.

5. It is presumed that official duty has been regularly performed. (*Yeaton v. Barnhart*, 249.)

Evidence—Declarations Against Interest—Statute.

6. In an action for the specific performance of an alleged oral contract to convey land brought against the vendor's executrix, declarations of the deceased vendor against his interest were admissible under the express provisions of Section 710 and Section 727, subdivision 4, L. O. L. (*Goff v. Kelsey*, 337.)

Evidence—Self-serving Declarations—Statute—"Party."

7. Under Section 732, subdivision 2, L. O. L., providing that when a party to action by or against an executor or administrator offers declarations by the deceased against his interest, declarations of the deceased as to the same subject matter in his own favor may also be shown, an executrix of an alleged vendor who, in an action for specific performance of an oral contract to convey, was impleaded as a party defendant, and who by Section 1185, L. O. L., was entitled to the possession of the property and the rents and profits during administration, or until the property was surrendered to the heirs or devisees, and whose right to possession was not terminated by completion of administration within Section 1304, and who had released her claims or surrendered to the heirs and devisees within Section 1305, was a "party," so that where plaintiff put in decedent's declarations against interest, decedent's self-serving declarations were admissible. (*Goff v. Kelsey*, 337.)

Evidence—Res Gestae.

8. Such testimony was admissible as part of the *res gestae*. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

Evidence—Admission—Record of Previous Conviction on Plea of Guilty.

9. Where plaintiff passenger, after his arrest by defendant railroad's conductor and ejection from the train for being drunk, pleaded guilty to a charge of being drunk and disorderly in the city, the record of the conviction, in plaintiff's subsequent suit against the road for his arrest by the conductor, was admissible in evidence as an inconclusive admission against plaintiff's contention in the suit that he was sober when arrested. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

Evidence—Master and Servant—Expert Evidence—Machinery.

10. In a servant's action for injury from the dangerous and unprotected cogwheels in a sawmill, where defendant did not claim that the place of work was not dangerous, but that plaintiff's disregard of his duties caused the injury, expert testimony of a mechanical engineer who had worked in several similar places that the place under the sorting-table where the cogwheels moved was dangerous was inadmissible. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Evidence—Documentary Evidence—Erasures and Alterations in Contract.

11. In an action for breach of a contract to sell and deliver hops, testimony of plaintiff held to show that all alterations and erasures appearing in the contract were made either before it was executed or by consent of the parties, and no error was committed in the admission of the document in evidence. (*Schucking v. Young*, 483.)

Evidence—Documentary Evidence—Effect of Testimony on Rebuttal.

12. On rebuttal, plaintiff having corrected his testimony in chief as to the time when the alterations and erasures appearing in the contract introduced by him in evidence were made, did not make the document inadmissible or the act admitting it erroneous. (*Schucking v. Young*, 483.)

Evidence—Parol Evidence Admitted to Explain Transaction not to Contradict Writing.

13. Parol evidence is properly admitted where it tends to establish that a certain contract executed by one L. was in fact the contract of two other defendants, R. and D., the object of such parol evidence being to explain the whole transaction, rather than to contradict the contract. (*Riddle State Bank v. Link*, 498.)

Evidence—Documentary Evidence—Intention Explained by Parol.

14. Where a written contract has been introduced in evidence, and it appearing that same was executed by R. and L. as an agreement for and on behalf of R. as one party and L. W. and H. as the other, it was not error to show by parol that the contract was in fact not only the act of L., but that of W. and H. as well. (*Riddle State Bank v. Link*, 498.)

Evidence—When Courts will Take Judicial Notice of City Charter.

15. A municipal charter enacted by legal voters of a city is in its nature the result of a special election, and, unless pleaded, courts cannot take judicial notice thereof in the absence of statutory authority so to do. (*Birnie v. La Grande*, 531.)

See Appeal and Error, 5, 20, 24, 25a, 25b, 26.

See Cancellation of Instruments, 3.

See Deeds, 1.

See Execution, 1.

See False Imprisonment, 2, 3, 5.

See Garnishment, 4.

See Master and Servant, 20, 21.

See Partnership, 1, 2.

See Pledges, 1.

See Sales, 6, 8.

See Specific Performance, 2, 3, 5.

See Vendor and Purchaser, 4.

See Waters and Watercourses, 5.

Exclusion of Evidence in Equity Suits.

See Equity, 1.

Objections to Evidence.

See Appeal and Error, 7.

See Pleading, 2.

EXCEPTIONS.

See Appeal and Error, 15.

When Exceptions are not Necessary.

See Appeal and Error, 3.

EXCEPTIONS, BILL OF.**Exceptions, Bill of—Incorporating Evidence.**

1. Failure to include all of plaintiff's testimony in a bill of exceptions does not prevent hearing the question of nonsuit, since Article VII, Section 3, of the Constitution as amended, is complied with by attaching all testimony to the bill of exceptions. (Camp & DuPuy v. Lauterman, 134.)

See Appeal and Error, 27.

See Contempt, 1.

EXECUTION.**Execution—Evidence Sufficient to Discharge Execution Against Person.**

1. In a proceeding to obtain a discharge from imprisonment under an execution against the person, evidence examined and *held* to show that the debtor had no property whatever liable to execution. (Heckinger v. Swank, 526.)

Execution—Necessary Parties to Proceedings to Attack—Husband and Wife.

2. Whether a conveyance by a husband to his wife be valid or fraudulent, she is a necessary party to a proceeding to set it aside, and the imprisonment of the husband on an execution against the person cannot be used as a means to extort from the wife the payment of the husband's debts, neither can such imprisonment be made to rest upon mere whim or caprice, or in utter disregard of the evidence. (Heckinger v. Swank, 526.)

Execution—Discharge from Imprisonment on Taking Debtor's Oath.

3. Where a party was imprisoned under execution against the person, and was destitute of any means that could be applied to the satisfaction of judgment, it is the duty of the judge to administer the debtor's oath prescribed by Section 4549, L. O. L., and in addition thereto to grant him the certificate of discharge prescribed by Section 4550, L. O. L. (Heckinger v. Swank, 526.)

EXECUTORS AND ADMINISTRATORS.**Executors and Administrators—Sale of Property—Collateral Attack.**

1. Defenses, interposed in an action by a purchaser at an administration sale to pay debts of the estate to enjoin the sale of real property and to quiet the title thereto, which attack the power of the court to order the sale, are equivalent to collateral attacks on the order of the County Court directing the sale and are unavailing, unless the order assailed was necessarily void. (Yeaton v. Barnhart, 249.)

Executors and Administrators—Sale of Land—Jurisdiction of County Court.

2. Under Article VII, Section 1, of the Constitution, vesting the County Court, among others, with general jurisdiction to be defined and regulated by law, Section 12, giving such court jurisdiction pertaining to Probate Courts, and Section 13, authorizing the county judge to grant preliminary injunctions and such other writs as the

legislature may authorize him to grant, and Section 936, subdivision 5, L. O. L., giving it exclusive probate jurisdiction in the first instance to order the sale and disposal of the property of decedents, the County Court is a court of general and superior jurisdiction in probate matters, and is vested with limited judicial functions in the common-law sense, which it may exercise in all prescribed matters beyond its special statutory authority in the transaction of county business, and, on petition for the sale of the realty of a decedent based on an allegation of facts requiring an exercise of its power, it could determine its jurisdiction, which determination was conclusive, unless reversed on appeal or avoided for fraud in a direct proceeding. (*Yeaton v. Barnhart*, 249.)

Executors and Administrators—Sale of Realty—Sufficiency of Petition.

3. Under Section 1135, L. O. L., declaring that the court in probate proceedings exercises its powers by means of an affidavit or the verified petition or statement of a party, and Section 1253, providing that a petition for the sale of the real property of a decedent shall state the amount of the sales of personal property, the condition and probable value of the different lots of land, the amount and nature of any liens thereon, and the names, ages and residences of the heirs of the deceased, a petition by an administratrix, duly verified, showing a necessity for the sale, particularly describing the real property involved, in which the errors or defects, in some respect material, might have been avoided on appeal, but where an appeal had become barred and the order had become the foundation of title to property, was sufficient. (*Yeaton v. Barnhart*, 249.)

Executors and Administrators—Administrator's Sale—Effect on Dower.

4. A sale of real property by an administratrix to pay the debts of the deceased did not divest the widow of her right of dower in the premises. (*Yeaton v. Barnhart*, 249.)

Executors and Administrators—Sale of Property—Interest of Heirs—Judgment Against Heirs.

5. An administrator's sale of the real property of an intestate to pay his indebtedness deprives the heirs of their estate in the premises, since their rights are inferior to the demands of the creditors, and necessarily destroy the lien upon such land of any judgment rendered against the heir; but, in case of such sale, the judgment creditor of an heir is not without remedy, as when the distributive share of the heir has been ascertained and ordered by the court to be paid, and such proportionate part of the estate is no longer in the custody of the law, he may thereupon garnish it in the hands of the administrator. (*Yeaton v. Barnhart*, 249.)

Executors and Administrators—Sale of Real Estate—Collateral Attack.

6. Where an administrator's petition for the sale of real estate was sufficient to invoke an exercise of jurisdiction, an order based thereon could not be set aside on collateral attack, though the application and subsequent proceedings might have been vacated on direct appeal. (*Yeaton v. Barnhart*, 249.)

Executors and Administrators—Sale of Property—Interest of Creditors of Heirs.

7. A creditor of an heir of an intestate who has not secured any lien on the heir's interest in real estate, cannot assert any interest therein as against a purchaser at an administrator's sale. (*Yeaton v. Barnhart*, 249.)

Executors and Administrators—Sale of Property—Interest of Creditors of Heirs.

8. A creditor of an heir of an intestate who has acquired a lien against the heir's interest in real estate, and who has actual notice of an application and proceedings for the sale of the land of the intestate or who knows facts such as would put a person of ordinary prudence on inquiry, is guilty of laches precluding any assertion of his judgment lien against the interest in the real estate as against a purchaser at the administrator's sale, where he fails to interpose objections in the proceedings. (*Yeaton v. Barnhart*, 249.)

Executors and Administrators—Sale of Property—Rights of Lien Claimants of Heirs.

9. Where a creditor of an heir of an intestate had acquired a lien against the heir's interest in the land of the intestate, and he had no actual notice of proceedings for the sale of the land by the administrator until after the sale was completed, his lien must be decreed against the interest the heir had in the land prior to the sale. (*Yeaton v. Barnhart*, 249.)

Executors and Administrators—Realty—Right of Possession.

10. While the condition of an estate may be such as not to require an executrix to take possession of the real property, her right to possession continues until foreclosed by a settlement of the estate, or otherwise terminated. (*Goff v. Kelsey*, 337.)

EXPERT TESTIMONY.

See Evidence, 2, 10.

FALSE IMPRISONMENT.

False Imprisonment—Persons Liable—Carriers—Arrest of Passenger by Conductor—Liability of Road—Statute.

1. Under Laws of 1911, Chapter 135, providing that to be intoxicated or to drink intoxicating liquor in an ordinary passenger car is a punishable crime, and Section 6959, L. O. L., declaring that the conductor of a railroad train, while actually engaged as such, shall have the power of a sheriff, in each county through which the train passes, to protect the public peace and arrest violators thereof on or near the train, where defendant railroad's conductor arrested a sober passenger on the pretext that he was drunk, the railroad could not escape liability for the tort on the ground that the conductor was acting as sheriff and had laid aside his character as defendant's servant. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

False Imprisonment—Evidence—Good Faith.

2. In an action against defendant railroad by one claiming to have been arrested by the conductor, ejected from the train, and thrown

into prison for drunkenness, when in fact perfectly sober, testimony that plaintiff's companions, who drank with him from the same bottle, were not disturbed by the conductor, was admissible as bearing on the good faith of the conductor in making the arrest. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

False Imprisonment—Evidence—Continuing Character of Tort.

3. Where defendant railroad's conductor arrested plaintiff on the pretext that he was drunk, ejected him from the car, and turned him over to the railroad's watchman, who incarcerated him in a city jail, the road's trespass was one continuing through the incarceration and up to plaintiff's release, and it was liable for the imprisonment, as well as the unlawful ejection, so that evidence was admissible to prove the condition of the city jail. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

False Imprisonment—Damages—Mental Suffering.

4. Where a railroad passenger was taken from the train by the conductor and other agents of the road on the pretext that he was drunk and drinking in the car, which arrest was accomplished with some degree of physical force and involved a false imprisonment of the passenger, in his action against the road he could recover for humiliation on account of the public ejection from the car, although, except in cases of slander, breach of promise, and the like, a recovery for mental suffering unaccompanied by physical injury will not be permitted. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

False Imprisonment—Evidence—Relevancy.

5. In an action against a railroad for injuries sustained by plaintiff when arrested for drunkenness, by defendant's conductor, ejected from the train, and imprisoned, testimony of a witness, who had given plaintiff the bottle from which he was drinking at the time of the arrest, which plaintiff claimed contained ginger ale instead of beer, that he (the witness) was a good, clean athlete and drank no liquor, was admissible. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

FEDERAL AUTHORITY.

Over Tide-water Lands.

See *Navigable Waters*, 1.

FIDUCIARY RELATION.

See *Joint Adventures*, 3.

FINDINGS.

See *Appeal and Error*, 19.

FOOD.

Food—Candy—Alcohol—"Adulterated."

1. Where a manufacturer of chocolate candy containing 1.05 per cent alcohol sold it in packages whose label made no mention of the alcohol, but simply referred to the candy as "chocolates," such candy was an adulterated article of food within the meaning

of Section 21, subdivision 16, of the Pure Food Law (Laws 1915, p. 565), defining the adulteration of candy, regardless of whether a food commissioner had theretofore established a standard of purity for candy as required by the act, since free alcohol is injurious and harmful to the health of partakers. (*Hoefler v. Mickle*, 399.)

Food—Pure Food Law—Construction.

2. The Pure Food Law (Laws 1915, p. 558) is remedial in its nature, and should be liberally construed. (*Hoefler v. Mickle*, 399.)

Food—Pure Food Law—Candy—Alcohol—"Misbranded."

3. Chocolate candy, containing 1.05 per cent alcohol, but sold in packages whose label refers to the candy simply as "chocolate," without mentioning the alcohol contained, was "misbranded" within the meaning of Pure Food Law (Laws 1915, p. 567), Section 35, since alcohol is a deleterious substance. (*Hoefler v. Mickle*, 399.)

FORECLOSURE.

See Chattel Mortgages, 1.

See Mines and Minerals, 1, 3.

See Mortgages, 9.

FOREIGN CORPORATIONS.

See Corporations, 1, 2, 4, 5.

FRAUD.

See Bills and Notes, 4.

See Cancellation of Instruments, 3.

See Corporations, 7.

See Pleading, 9.

See Reformation of Instruments, 3.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Right of Husband to Donate Services to His Wife.

1. A husband may rightfully give his services, however valuable, to his wife, and his creditors cannot complain of his so doing. *King v. Voos*, 14 Or. 91 (12 Pac. 281), and *Livesley v. Heise*, 48 Or. 147 (85 Pac. 509), approved and followed. (*Heckinger v. Swank*, 526.)

GARNISHMENT.

Garnishment—Service of Notice of Garnishment—Persons Authorized to Serve.

1. Under Section 298, L. O. L., relative to writs of attachment, and Section 300, providing that the sheriff to whom the writ is di-

rected and delivered shall execute it without delay, a sheriff was not authorized to serve a writ of attachment directed to the sheriff of another county, and his service of a notice of garnishment created no lien upon any debt due from the garnishee to the defendant. (Edwards v. Case, 220.)

Garnishment—Notice of Garnishment—Requisites.

2. A notice of garnishment should be directed to the person, firm or corporation having possession of property of, or owing a debt to, the defendant named in the writ of attachment, warning the garnishee that such goods and chattels or choses in action are attached and garnished to answer the plaintiff's demands when evidenced by a judgment. (Edwards v. Case, 220.)

Garnishment—Appearance of Garnishee—Effect.

3. Where a notice of garnishment, by means of which it was sought to attach a debt due the defendant from an insurance company, was addressed to the company's attorney in fact, instead of the company itself, and was served by a sheriff other than the sheriff to whom it was directed, the fact that the attorney in fact and the insurance company's general adjuster gave certificates in response to the notice, showing that the company had insured the defendant's stock of goods, did not confer jurisdiction of the subject matter of the debt undertaken to be garnisheed, as the garnishee cannot, by voluntarily appearing, waive defendant's rights, especially as attachment proceedings, though of ancient origin, are not of common-law origin, but in derogation thereof. (Edwards v. Case, 220.)

Garnishment—Liability of Garnishee—Evidence.

4. Where plaintiff, in an action in which a writ of attachment was served upon an insurance company, believing the certificates of the garnishee in response to the notice of garnishment to be insufficient, filed allegations and interrogations equivalent to a complaint in a cause of action in her favor against the garnishee, but, though the insurance company's answers to such interrogatories showed the issuance of a policy of insurance to the defendant and the destruction of the insured property by fire, they did not disclose a debt for any specific sum as being due defendant on account of the fire, or admit any liability therefor, and plaintiff offered no other evidence, no judgment could have been rendered against the garnishee based on such answers. (Edwards v. Case, 220.)

See Corporations, 3.

GOOD FAITH.

See False Imprisonment, 2.

HABEAS CORPUS.

Habeas Corpus—Custody of Infant.

1. *Habeas corpus* proceedings, instituted to secure the discharge of children from alleged illegal restraint, though somewhat analogous to the ordinary application for discharge from illegal arrest, are usually contests between those claiming the custody of the child, in which case inquiry is directed as to which contestant is better fitted to have control of the infant. (Ex parte Bowers, 390.)

HARMLESS ERROR.

See Appeal and Error, 11, 23, 24, 25a, 30.

HIGHWAYS.**Highways—Easement—Reverter.**

1. A county, using a strip of another's land as a public highway, thereby obtained only an easement, the fee remaining in the owner; and on abandonment of the highway the owner, or his heirs and assigns, would take discharged of the easement. (*McHargue v. Calchina*, 326.)

Highways—Duties of State Engineer in Construction of Highways—“Persons Interested.”

2. The title of the act of 1913, Laws of 1913, page 663, sets forth its objects and purposes, and provides that the state highway engineer shall render assistance to the several County Courts and highway officers in the construction of roads. Under Section 6 of the act it is made the duty of the state engineer to furnish such information and advice as may be requested by persons interested in the construction and maintenance of public highways, and a contractor constructing a highway pursuant to a contract with a county is an “interested person,” and is entitled to the information. (*Peterson v. Lewis*, 641.)

Highways—Duties of State Engineer in the Construction of County Roads.

3. Under the provisions of Section 6 of the act of 1913, Laws of 1913, page 663, requiring the state highway engineer to act as adviser for and co-operate with the county authorities having in charge the building of county roads, when called upon so to do, even to such an extent as will carry into execution the plans adopted by him, following the policy initiated by the federal government in the construction of sample county roads, requires active co-operation on the part of such engineer, and not mere casual advice on building public county roads. (*Peterson v. Lewis*, 641.)

Highways—Statutes Relating to Their Construction.

4. Under statutes relating to the construction of highways, it is the duty of the state engineer to furnish the county authorities a final estimate of the work done, and whether or not the road is completed, and the amount due the contractor under the contract, all of which is a part of the construction work of such highway. (*Peterson v. Lewis*, 641.)

HUSBAND AND WIFE.

See Execution, 2.

See Fraudulent Conveyances, 1.

IMPEACHMENT OF VERDIOT.

See Trial, 5.

IMPRISONMENT.

See Execution, 1-3.

See False Imprisonment, 1-5.

IMPROVEMENTS.

See Municipal Corporations, 1-4.

See Specific Performance, 4.

INDORSEMENT.

See Bills and Notes, 1, 3.

INFANTS.

Infants—Delinquent Children—Statutes.

1. Legislation creating Juvenile Courts was not designed to convict youths charged with commission of crime, but rather to control the training of neglected children; therefore, the act of the Juvenile Court, in awarding to any person custody of dependent minor is not a judgment in a criminal action. (*Ex parte Bowers*, 390.)

Infants—"Dependent Child"—Juvenile Court Act.

2. Section 4406, L. O. L., defines a "dependent child" as any person under the age of 18 years who is destitute, homeless, or abandoned. Section 4407, L. O. L., which formerly conferred upon the Circuit Court of Multnomah County original jurisdiction as a Juvenile Court, because the county contained more than 100,000 inhabitants, was amended by Laws of 1915, page 177, Section 1, which gave that power to the county courts of several counties. Section 4109, L. O. L., authorizes any resident of the county to file a petition setting forth facts constituting dependency of a child, while Sections 4410, 4414, and 4415, L. O. L., provide for citation upon the petition and proceedings thereunder authorizing the court to award the care of dependent children to some reputable person. The Circuit Court of Multnomah County made a finding that a child was dependent and provided that its custody should be delivered to persons in another county. After the amendment, the county court of Multnomah County directed that custody of the infant should be restored to the mother. *Held* that, as the county which first obtains jurisdiction over an infant retains it, though the infant be carried into another county, such order of the Multnomah County Court was binding. (*Ex parte Bowers*, 390.)

INITIATIVE PETITION.

See Municipal Corporations, 8.

INJUNCTION.

Injunction—Jurisdiction—Adequate Remedy at Law—Title to Land.

1. Equity will take jurisdiction of a suit to prevent the defendant from constructing a log boom, by driving piles along the harbor line directly in front of tide-lands alleged to be owned by complainants, and thence across the lands, isolating them from the navigable channel, and preventing ingress and egress to complainants' other property, to their irreparable injury, and threatening to fill the boom with sawlogs, even though defendant denied the alleged ownership, since the ownership, as to which an action of ejectment might have afforded an adequate remedy at law, was not the only question involved, but

was ancillary to other questions of access, etc. (*Fellman v. Tidewater Mill Co.*, 1.)

Injunction—Not the Proper Remedy to Test the Workmen's Compensation Act.

2. The benefits to be derived under the Workmen's Compensation Act (Laws 1913, p. 188) will not be enjoined at the instance of an injured employee, on the ground that the State Industrial Accident Commission and the State Treasurer are depriving him of the right of a trial by jury, and are unlawfully attempting to dictate and determine the amount he shall recover, for the reason he could test the unconstitutionality of the act and the authority of the commission, by ignoring them and bringing his action either at common law or under the Employers' Liability Act. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

Injunction—Burden of Taxpayer by Payment of Salaries to Commission as Grounds.

3. Plaintiff has shown but one reason why he should be allowed to bring this suit, and that is because he is a taxpayer; that by the unlawful expenditure of the money appropriated under the provisions of the act, his financial burdens might be increased. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

To Enjoin Infringement of a Trade Name.

See Trademarks and Trade Names, 3.

INJURIES TO REAL PROPERTY.

See Courts, 1-3.

INSTRUCTIONS.

See Appeal and Error, 14.

See Damages, 1.

See Master and Servant, 10, 22.

See Replevin, 3, 4.

See Sales, 9.

INTENTION.

See Evidence, 14.

INTEREST.

See Vendor and Purchaser, 6.

INTERSTATE COMMERCE.

See Commerce, 1.

IRRIGATION.

See Bills and Notes, 4.

See Contracts, 3, 4.

See Waters and Watercourses, 1, 3-7.

JOINT ADVENTURES.

Joint Adventures—Presumption as to Interest of Parties in Telephone Line.

1. Where the evidence was conclusive that three persons constructed a certain telephone line as a joint venture, which act created,

as between themselves, a fiduciary relation analogous to a partnership, it will be presumed, where there is no evidence to the contrary, that each had an undivided one-third interest. (*Salem-Fairfield Telephone Assn. v. McMahan*, 477.)

Joint Adventures—Mutual Rights—Corporations.

2. Where the interests of two or three persons owning a telephone line as a joint venture were absorbed and taken over by a corporation, but the third party retained his interest, *held* that the assignee of the party retaining his interest was entitled to an undivided one-third interest in the line, subject to the payment of his ratable share of the operating expenses of a three-party line. (*Salem-Fairfield Telephone Assn. v. McMahan*, 477.)

Joint Adventures—Fiduciary Relation Equivalent to a Partnership Created.

3. Where sole agents were authorized by a gas company to dispose of its corporate stock by their united efforts, such disposal of the capital stock created a fiduciary relation tantamount to a partnership, and in the absence of a showing it will be presumed that the parties thus engaged shared equally the profits and losses pertaining to the business. (*Campbell's Gas Burner Co. v. Hammer*, 612.)

JUDGMENT.

Judgment—Conformity to Pleadings.

1. In an action for an injury to real property by removing machinery from a sawmill, plaintiff cannot recover for the taking and conversion of personal property. (*Montesano Lbr. Co. v. Portland Iron Wks.*, 53.)

Judgment—Lien—Interest of Heirs.

2. Where a daughter of an intestate inherited his real property under Section 7348, L. O. L., subject to her mother's dower under Section 7286, and to the indebtedness of the estate and the expense of administration, any judgment rendered against the daughter and docketed prior to the day when she, as administratrix applied for leave to sell the realty to pay debts of the intestate became a lien on her interest therein. (*Yeaton v. Barnhart*, 249.)

Judgment—Docketing Justice's Judgment—Lien.

3. Section 2442, L. O. L., provides that a judgment of a Justice's Court for the recovery of money does not become a lien upon real property until a transcript thereof has been filed with the county clerk. Section 2449 provides that judgment duly docketed in the Circuit Court may be enforced as a judgment of that court. Section 771 requires the justice certifying the transcript to state that the copy had been compared by him and is a correct transcript of the judgment. Section 201 provides that a judgment of a Circuit Court must be entered by the clerk within the day it is rendered, and Section 205 requires the clerk immediately after recording the judgment to make a memorandum thereof in the lien docket. *Held*, that judgments against the interest in real property inherited by defendant from her father, not filed as required by such provisions before her application, as administratrix, to sell realty of the estate to pay debts, were not liens on her property, that judgments the transcripts

whereof were not certified as required by statute created no liens thereon, but that a judgment duly docketed before such application became a lien thereon. (*Yeaton v. Barnhart*, 249.)

Judgment—Conclusiveness—Conviction of Crime.

4. Where defendant railroad ejected plaintiff passenger from its train, arresting and imprisoning him in the city jail for being drunk and drinking on its car, plaintiff's plea of guilty to a charge of being drunk and disorderly in the city had no conclusive effect in his subsequent civil action for his arrest and ejection by the road. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

Judgment—Conclusiveness—Issues Determined.

5. A party is bound by a judgment on all questions actually litigated or which might have been determined. (*Cooley v. Snake River Imp. Co.*, 384.)

Judgment—Res Judicata—Estoppel by Judgment.

6. Estoppels by judgment must be mutual to be effective. (*Cooley v. Snake River Imp. Co.*, 384.)

Judgment—Res Judicata—Estoppel.

7. An improvement district contracted for the construction of a pumping plant for irrigation purposes and deposited its bonds with a bank to be delivered to the contractor on the completion of the contract, which stipulated for extra work. The bank brought interpleader suit against the contractor and the district. The contractor alleged the completion of the contract without making any demand for extra work. The district did not demand damages for faulty construction of the system, but denied the completion of the work and alleged delay in the construction thereof. The court directed delivery of the bonds to the contractor, who thereafter brought action against the district for extra work, required to be performed under the contract, under the order of the engineer. *Held*, that the contractor sought to reopen the case to recover for extra work, and he could not complain because the district counterclaimed for damages for faulty construction of the system on the ground that the judgment directing a delivery of the bonds was conclusive on that question. (*Cooley v. Snake River Imp. Co.*, 384.)

Judgment—Vacation—Mistake—"Discretion."

8. The discretion accorded the trial judge by Section 103, L. O. L., to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, is a legal discretion, to be exercised in accordance with the spirit of the law and in a manner to subserve, and not defeat, the ends of justice. (*Fretland v. Cantrall*, 439.)

Judgment—Bar—Nonsuit.

9. Plaintiff failing to appear at the trial, and no good reason for final determination of the cause being shown, the appropriate remedy of defendants, if desiring a judgment, is by nonsuit, as provided in Section 182, subdivision 3, L. O. L., which, by provision of Section 184, does not bar another action for the same cause; and not by judgment for defendant. (*Fretland v. Cantrall*, 439.)

Judgment—Setting Aside—Mistake.

10. A jury being impaneled when, by mistake or misunderstanding as to date of trial, counsel for plaintiff were absent, and a judgment for defendant, instead of one of nonsuit, being granted, on the mere swearing of a witness, without any evidence being elicited, it was an abuse of discretion not to grant relief therefrom under Section 103, L. O. L. (*Fretland v. Cantrall*, 439.)

Judgment—When Conclusive Only as to Matters Actually Litigated—*Res Judicata*.

11. The rule of *res judicata* allows to each party a day in court, and requires that all matters of a judicial controversy shall be determined in the same suit or action, if they can be legally joined, and an opportunity is offered to plead them, and it follows that a final judgment or decree bars all subsequent proceedings upon the same cause of suit or action and of every other matter that might have been decided, relating either to the cause of action or matter of defense, but if founded upon a different cause of action or ground of defense, the prior judgment or decree is an estoppel only as to the matters actually litigated. (*Campbell's Gas Burner Co. v. Hammer*, 612.)

Judgments—Matters Concluded.

12. From the agreed statement of facts filed in this suit it appears that the corporation appointed four persons as sole agents to sell and dispose of the corporate stock, who were to receive as their commissions all sums obtained for said stock in excess of \$7 a share. After the agents had sold the stock and the corporation became liable for the commissions, three of them disposed of their claims and assigned same to other parties, while the other was adjudicated a bankrupt. The assignees of the claims for commissions entered into a contract with an attorney agreeing to allow him 30 per cent of the amount recovered. Prior to the hearing and trial of the suit of the attorney against the corporation, two of the claimants compromised and executed releases to the corporation for the amount of their claims. *Held* that after the compromise and settlement was made by the corporation with the two agents, the defendant in the law action was not obliged to allege in its answer the fact of such assignments, and its failure so to do will not bar a subsequent suit to enjoin an execution in the interest of one claiming a percentage of the judgment on the causes of action assigned. (*Campbell's Gas Burner Co. v. Hammer*, 612.)

See Appeal and Error, 18, 31.

See Executors and Administrators, 5.

See Mines and Minerals, 3.

See Pleading, 7.

JUDICIAL NOTICE

See Evidence, 15.

JURISDICTION.

See Appeal and Error, 25.

See Courts, 3, 4.

See Equity, 2.

See Executors and Administrators, 2.

See Injunction, 1.

JURY.**Jury—Challenge—Interest.**

1. Where, in an action for personal injuries, the defendant was president of a bank in which one juror was a depositor, while two others were its debtors for considerable sums, the retention of such jurors over plaintiff's objection was proper, since the indirect relationship of the jurors to the defendant was not such as to disqualify them, as a matter of law; the propriety of their sitting being a question of fact for the trial court, not reviewable in the absence of an abuse of discretion. (*Twitchell v. Thompson*, 285.)

See Appeal and Error, 11.

JUSTICES OF THE PEACE.**Justices of the Peace — Supplementary Proceedings — Disobedience of Order—Punishment—Proceedings.**

1. Where a judgment debtor is discharged, in proceedings for contempt before a justice of the peace in not paying over, as ordered, money found to be in his possession in supplementary proceedings, and the judgment creditor appeals to the Circuit Court, the burden is on the creditor to show that the money is still in the debtor's possession; there being no presumption thereof. (*State v. Rider*, 318.)

JUVENILE COURTS.

See Infants, 1, 2.

LACHES.

See Corporations, 8.

See Pledges, 3, 4.

LA GRANDE, CHARTER OF.

See *Birnie v. La Grande*, 531.

LANDLORD AND TENANT.**Landlord and Tenant—Covenants—Quiet Enjoyment.**

1. In case of a demise, a covenant of quiet enjoyment is implied, for from the fact of the letting, it will be presumed that the landlord had the right to lease, and that he agreed to protect the lessee against eviction, either by title paramount or his own acts. (*Northern Brewery Co. v. Princess Hotel*, 453.)

Landlord and Tenant—Covenants Running With Land—Implied Covenants.

2. The implied covenant of quiet enjoyment arising in case of a lease is not in violation of Section 7105, L. O. L., declaring that no covenant shall be implied in any conveyance of real estate, for a lease of land is not a conveyance. (*Northern Brewery Co. v. Princess Hotel*, 453.)

Landlord and Tenant—Liability for Rent—Eviction by Receiver.

3. Where, at the suit of the landlord, the tenant was evicted, and a receiver, appointed by the court, took possession of the premises, the tenant's liability for rent then ceased, and the landlord

could, on foreclosure of a chattel mortgage to secure the rent, recover only that already accrued. (*Northern Brewery Co. v. Princess Hotel*, 453.)

LAST CLEAR CHANCE.

See *Municipal Corporations*, 5.

LAW OF THE CASE.

See *Appeal and Error*, 22.

LAWS OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

LEGISLATIVE POWER.

See *Constitutional Law*, 1, 7, 8.

LEVY.

See *Taxation*, 1-4.

LIENS.

See *Constitutional Law*, 2.

See *Judgment*, 2, 3.

See *Mines and Minerals*, 1-3.

LOW-WATER MARK.

See *Navigable Waters*, 2.

MANDAMUS.

Mandamus—Questions must be of Sufficient Importance.

1. The matter involved, in order to justify *mandamus*, must be substantial, and of sufficient importance to invoke the use of the remedy. (*State ex rel. v. Hare*, 540.)

Mandamus—Unjust Claims or Correction of Errors not Grounds for Issuance.

2. The writ of *mandamus* is used to promote principles of justice, and will not issue to support unjust claims, although technically regular, neither will it be employed for the correction of errors. (*State ex rel. v. Hare*, 540.)

Mandamus—Necessity to Demand a More Specific Estimate Before Mandamus is Granted.

3. It does not appear that any request was made to the County Court for a more specific estimate. As a general rule, however, where the duty to be performed by an official is of a purely public nature, and where there is no one person upon whom the right or duty devolves to make a demand for performance, an express demand or refusal is not necessary. There are exceptions to this rule, and where the proper mode of performance is doubtful, a demand specifying the

proper mode will be required before the writ will be granted. (State ex rel. v. Hare, 540.)

Mandamus—Doubtful Nature of Questions Involved.

4. *Mandamus* will issue only in cases of necessity to prevent injustice or great injury, and if there is a doubt of its necessity or propriety, it will not be issued. (State ex rel. v. Hare, 540.)

Mandamus to Reinstate Teacher Unlawfully Removed by School Board.

5. *Mandamus* will lie to compel a school board to reinstate a teacher who is holding under a statutory tenure, and has been removed either without proper proceedings or for an insufficient reason. (Richards v. District School Board, 622.)

Mandamus—Under What Circumstances the Writ will Issue—Construction of Contracts.

6. Where the law imposes an obligation on a particular person to perform some particular act, and no other specific remedy is provided for, *mandamus* is the proper remedy, and the remedy may be applied to compel the performance of a contract that involves an official duty, though it will not lie to enforce private contracts. (Peterson v. Lewis, 641.)

Mandamus—Compelling Performance of Official Duties.

7. The state highway engineer is required under the act of 1913, Laws of 1913, page 663, to provide information to the contractor and render assistance to the county authorities, and, among other things, is to furnish a final estimate of the work done on the contract, and where he fails or refuses, may be compelled to furnish such final estimate by *mandamus*. (Peterson v. Lewis, 641.)

Mandamus—Parties—"Deputy" to Act Only in Behalf of His Principal.

8. The act creating the office and prescribing the duties of the state highway engineer, Laws of 1913, page 663, were amended by Laws of 1915, page 537, transferring those duties to the state engineer and requiring such duties to be performed by his deputy. A proper performance of the duties required by the act could be enforced by *mandamus* against the state engineer, for the reason that the deputy state engineer was not an independent officer, but acted only on behalf of his principal. (Peterson v. Lewis, 641.)

MARRIAGE.

As Ground for Dismissing Teacher.

See Schools and School Districts, 10.

MASTER AND SERVANT.

Master and Servant—Actions for Injuries—Questions for Jury.

1. In an employee's action for injuries sustained while reducing a carload of lumber and claimed to have been caused by the method in which the foreman directed that the work should be done, evidence held to make the question for the jury as to whether the method of performing the work adopted by the employer was different from the usual one pursued by it. (Adams v. Corvallis & E. R. Co., 117.)

Master and Servant—Liability for Injuries—Contributory Negligence.

2. Where employees were not permitted to perform their work in their own way, nor according to the usual method adopted by the employer, but were directed by the foreman, who represented the employer and whose orders it was their duty to obey, to follow a different method, the employer was in no position to assert that the injury sustained by one of such employees by reason of the method of doing the work was occasioned by his fault. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Actions for Injuries—Questions for Jury.

3. Where an employer's foreman told employees who were reducing a carload of lumber that the method followed by them was too slow, and that one of them should get inside the car and shove out pieces of lumber until a sufficient amount had been removed, when the other was to signal him to stop, and then pick up and pile the lumber, and there was evidence that the employees had difficulty in hearing and understanding each other's signals, it was a question for the jury whether the method adopted by the employer was a reasonably safe one, and whether the work was carried on so as to expose the employee picking up the lumber to risks and dangers which might have been guarded against and avoided by the exercise of due care. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Liability for Injuries—Methods of Work.

4. In the absence of specific statutory requirements, a railroad company discharges its full duty to its employees in adopting and using standard railroad methods, rules or systems. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Liability for Injuries—Care Required.

5. An employer is not an insurer, but is liable for consequences not of danger, but of negligence, and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business; the standard of due care being the conduct of the ordinarily prudent man. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Actions for Injuries—Burden of Proof.

6. An employee suing for injuries claimed to have been due to an unusual method of work which he was directed by the foreman to follow was bound to show, not only that the method adopted and pursued was unusual, but that it was more dangerous in itself than the ordinary one. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Actions for Injuries—Questions for Jury.

7. According to the testimony for plaintiff in an employee's action for injuries sustained while reducing a carload of lumber, F. was handing lumber to plaintiff, when the foreman stated that that was too slow a method of removing the lumber; that F. should get inside the car and shove out pieces of lumber; that plaintiff should stand aside and keep tally as the pieces fell, and, when a sufficient amount had been removed, signal F. to stop, and, upon receiving his answer, pick the lumber up and pile it. Plaintiff and F. protested against this method, but complied with the order. After a number of sticks had been thrown out plaintiff called F. to stop, but F., being uncer-

tain whether he heard a call, answered back twice, and, receiving no reply, threw out another piece, striking plaintiff, who had started to pile up the lumber. Plaintiff testified that he heard F. answer, but could not say what he said. *Held*, that plaintiff was not negligent as a matter of law, as the evidence showed that it was not easy for the men to hear each other's signals, and it was necessary for plaintiff to accept F.'s response to his signal or cause the very delay which the foreman's order was designed to obviate. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Actions for Injuries—Burden of Proof.

8. A servant who disobeys the orders of his superior takes upon himself the burden of showing the lawful reason for such disobedience. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Liability for Injuries—Contributory Negligence—Disobedience of Orders.

9. A servant is not guilty of contributory negligence in obeying the orders of his master, unless the risk is so great that a person of reasonable prudence under the same circumstances would have refused to obey. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Actions for Injuries—Instructions.

10. In an employee's action for injuries sustained while assisting in reducing a carload of lumber and claimed to have been caused by the unusual and dangerous method of doing the work adopted by the employer's foreman, the instructions *held* to have fairly submitted the question to the jury. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Liability for Injuries—Assumption of Risk.

11. Independent of the statute, a servant assumes the ordinary risks and dangers incident to his employment. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Actions for Injuries—Presumptions—Assumption of Risk.

12. Where the jury finds an employer negligent, assumption of risk is not presumed. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Liability for Injuries—Assumption of Risk.

13. An employee did not assume risks occasioned by the negligence of his employer. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Liability for Injuries—Assumption of Risk.

14. An employee did not assume the risk of injury in obeying the orders of his foreman, unless a person of ordinary prudence would not have done so. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Liability for Injuries—Contributory Negligence Distinguished from Assumption of Risk.

15. In an employee's action for injuries sustained while assisting in reducing a carload of lumber, it was plaintiff's claim that against the protests of him and F. the foreman directed F. to get in the car, where he could not see plaintiff, and shove out pieces of lumber until signaled by plaintiff to stop, when plaintiff was to pile up the lumber; that he and F. had difficulty in understanding each other's signals,

and that he signaled F. to stop, but was injured by another piece thrown out by F. It was defendant's claim that plaintiff carelessly and negligently, without giving F. the signal to stop, and in violation of instructions, commenced picking up the lumber while F. was throwing it out. *Held*, that this dispute was properly tried out as a question of contributory negligence, and not as one of assumption of risk. (*Adams v. Corvallis & E. R. Co.*, 117.)

Master and Servant—Injury to Third Person—Presumption and Burden of Proof.

16. Where an injury to a third person occurs through the negligence of a driver regularly employed by the owner of an automobile, the jury are justified in inferring that the driver was acting within the scope of his authority, and upon the employer's business, and the employer has the burden of rebutting such evidence by showing that the real fact is otherwise. (*Kahn v. Home Tel. & Tel. Co.*, 308.)

Master and Servant—Pleading—Sufficiency of Reply.

17. In a servant's action for injury from dangerous and unguarded machinery, where the master pleaded contributory negligence and assumption of risk, a reply alleging that the control of the power was not visible from the place where plaintiff was injured, that he worked in a dangerous place only because ordered to work there, that he had no knowledge as to the manner of operating the machinery or of the dangers and risks of going underneath a sorting table in the sawmill, that he did not negligently place his hand or sleeve into the cogwheels, and denying that his injury was in any way due to his negligence, was a sufficient denial of the affirmative defense. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Master and Servant—Negligence—Employers' Liability Act—Contributory Negligence.

18. Under Employers' Liability Act (Laws 1911, p. 16) contributory negligence is not a defense, but may be taken into account by the jury in fixing the damages. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Master and Servant—Master's Liability—Assumption of Risk.

19. The defense of a servant's assumption of risk is not available in an action coming within the provisions of the Employers' Liability Act (Laws 1911, p. 16). (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Master and Servant—Action for Injury—Evidence—Machinery.

20. In a servant's action for injury from dangerous and unprotected cogwheels in a sawmill, evidence for plaintiff of a mechanical engineer who had visited the sawmill and examined the sorting-table where plaintiff was injured and observed the manner in which it was operated was admissible, where the operation was approximately the same as when the machinery was run before, and where a diagram of the sorting-table and the machinery showing the cogwheels was in evidence. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Master and Servant—Dangerous Place to Work—Evidence.

21. In view of Employers' Liability Act (Laws 1911, p. 16), Section 2, providing that the manager or foreman in charge of construction or operation should be the agent of the employer in

all suits for damages for injury to an employee, evidence in a servant's action for injury, where there was a dispute as to whether he was directed to work where he was injured, to the effect that the defendant's foreman had told him that if he did not like the job he could leave, was admissible as tending to show where plaintiff was required to work. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Master and Servant—Instructions—Contributory Negligence.

22. In view of the Employers' Liability Act (Laws 1911, p. 16), declaring contributory negligence to be no defense, defendant's requested charge that its negligence could not be presumed from the accident, but that plaintiff must show it was caused by defendant's sole negligence without plaintiff's own negligence, was properly modified by adding that, if it was solely the plaintiff's fault, and not his contributory fault, he could not recover. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Master and Servant—Title of the Workmen's Compensation Act is Constitutional.

23. The title to the Workmen's Compensation Act (Laws 1913, p. 188) is as follows: "An act creating the State Industrial Accident Commission and providing an Industrial Accident Fund, making an appropriation for such fund and providing for the administration of the terms of the act, providing for the collection and disbursement of funds for the benefit, compensation and care of workmen, prescribing the duties of employers and workmen subject to this act, and providing penalties for the violation of the terms of this act, and abolishing in certain cases the defenses of assumption of risk, contributory negligence and the negligence of a fellow-servant in actions for personal injury and death," does not violate that part of the state Constitution requiring every act to embrace but one subject, which shall be expressed in the title. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

Master and Servant—Constitutionality of the Workmen's Compensation Act.

24. The act under consideration (Laws 1913, p. 188) is not unconstitutional, because it requires the employee to elect at the time of his employment and prior to any injury whether or not he will come under the terms of the act, and further providing that in case he chooses to come under the terms of the act, he thereby waives the right to resort to the courts for redress, since the act proposes to both employers and employees a scheme for obtaining life and accident insurance in lieu of litigation, but is not compulsory on either, and this feature eliminates the objection that the act is unconstitutional. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

See Evidence, 10.

MEMORANDA.

See Brokers, 1, 3.

See Statute of Frauds, 2, 8.

MENTAL SUFFERING.

See False Imprisonment, 4.

MINES AND MINERALS.

Mines and Minerals—Liens—Foreclosure—Complaint—Sufficiency.

1. A complaint to foreclose liens for materials and labor on mining property, which alleges that plaintiff, at the request of defendant, the owner, and codefendant operating the mine, acting through a third person, their duly authorized agent, worked as an underground miner at an agreed wage per day, earning a specified sum, leaving unpaid a specified sum; that the services performed by plaintiff were performed in the working, development and operation of the property; that plaintiff, to perfect a lien, filed and caused to be recorded in the office of the county clerk in the county his claim and notice on May 4th, while the work was completed on March 31st preceding; that the claim and notice of lien contained the name of the lien claimant, a true statement of the claim and demand, after deducting all just credits, the name of the owner and reputed owner of the property, the name of the person by whom claimant was employed, a description of the property charged, a true statement of the contract, and that the lien has not been satisfied, but is a valid lien, states a cause of action. (*Haines Commercial Co. v. Grabill*, 375.)

Mines and Minerals—Notice of Lien—Statutory Provision.

2. A lien notice, which complies with Section 7445, L. O. L., providing that a true statement of the demand, after deducting credits and offsets, with the name of the reputed owner and name of the person by whom claimant was employed, with a description of the property, is sufficient, though it does not segregate the demand for overtime work. (*Haines Commercial Co. v. Grabill*, 375.)

Mines and Minerals—Liens—Foreclosure—Personal Judgment.

3. In a suit to foreclose a lien for materials and labor on mining property, brought against the owner and a lessee operating the property, the court, granting relief, cannot render a personal judgment against the owner. (*Haines Commercial Co. v. Grabill*, 375.)

MISBRANDING.

See Food, 3.

See Statutes, 2.

MISTAKE.

See Appeal and Error, 31.

See Judgment, 8, 10.

See Reformation of Instruments, 1, 2, 6.

MODIFICATION.

See Appeal and Error, 18.

MORTGAGES.

Mortgages—Deed as Mortgage—Parol Evidence.

1. A deed absolute on its face may be shown by parol to have been intended by the parties as security for payment of money, and to be in effect a mortgage. (*Niehans v. Shetter*, 447.)

Mortgages—Maxim.

2. It is a maxim of the law that "once a mortgage, always a mortgage." (*Niehaus v. Shetter*, 447.)

Mortgages—Deed as Mortgage—Laches.

3. The right to assert that a deed in form is a mortgage is not barred by laches; the grantor, and afterward his executor, remaining in possession, and paying the taxes, till agreement was made with the holder of the mortgage to pay them, pending a prospective sale, such holder not disavowing his trust or questioning that the deed was intended as a mortgage. (*Niehaus v. Shetter*, 447.)

Mortgages—Deed as Mortgage—Defeasance.

4. To constitute a deed in form a mortgage there need not have been a written deed of defeasance. (*Niehaus v. Shetter*, 447.)

Mortgages—Deed as Mortgage—Existence of Debt.

5. If a deed in form was designed as security for a debt at the time created, or theretofore existing and continued, it should be declared a mortgage. (*Niehaus v. Shetter*, 447.)

Mortgages—Deed as Mortgage—Purchasers.

6. A deed intended as a mortgage should be declared such against one who, knowing it to have been given as such, took a deed, also intended as a mortgage, from the grantee in the first deed. (*Niehaus v. Shetter*, 447.)

Mortgages—Full Disposition of Controversy.

7. A deed having, in a suit by the grantee to quiet title, been declared a mortgage, foreclosure should not be left to another proceeding, but had in such suit. (*Niehaus v. Shetter*, 447.)

Mortgages—Conditional Sale or Mortgage Distinguished.

8. In a case where purchasers of land, having given purchase money notes secured by a mortgage on the premises, and the same were assigned to plaintiff by the mortgagee as collateral security, conveyed the land to plaintiff under an agreement that they should be allowed to redeem if they desired, by payment of the debt, the transaction was, as to such mortgagors, a conditional sale, and not a mortgage, the debt being extinguished. (*First Nat. Bank v. Seawear*d, 567.)

Mortgages—Attorney's Fee in Foreclosure of Absolute Deed as a Mortgage.

9. Section 422, L. O. L., provides that in a suit to foreclose a lien upon real or personal property other than that of a judgment or decree, if it appear that a promissory note or other personal obligation for the payment of money has been given, the court shall also decree a recovery of the amount of such debt, as in case of an ordinary decree for the recovery of money. Defendants S. were indebted to plaintiff, and after selling land and receiving purchase money notes secured by mortgage, delivered such notes to plaintiff as collateral. Afterward plaintiff delivered up the notes and mortgage to the purchaser, and accepted a conveyance of the property. Thereafter this suit was instituted by the plaintiff to declare said deed a mortgage

and to foreclose the same, and to recover attorney's fees provided for in the notes involved herein. *Held* that although the collateral notes provided for attorney's fees, and though the notes representing the principal debt also so provided, plaintiff cannot recover compensation for its attorneys. (*First Nat. Bank v. Seawear*, 567.)

MOTIONS.

See Appeal and Error, 31.

See Trial, 2.

For Change of Venue.

See Venue, 1.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Public Improvements—Betterment Assessment—Validity.

1. A contract for a street improvement, giving the superintendent of streets power to increase or diminish its cost, after the contract has been made, by requiring a greater or less amount of material, as he shall determine, renders an assessment invalid. (*Miller v. Portland*, 165.)

Municipal Corporations—Public Improvements—Betterment Assessment—Estimation of Work.

2. To the validity of a street betterment assessment, it is not necessary that the preliminary estimate of the cost of making the improvement be precisely accurate, since a reasonable margin for miscalculation must be allowed. (*Miller v. Portland*, 165.)

Municipal Corporations—Public Improvements—Betterment Assessment—Exceeding Estimate.

3. Where the expense of completing a street improvement came to \$30,844, instead of \$13,652, as estimated, on account of unforeseen difficulty in foundation work for a retaining wall, such increase in the expenditure was so unreasonable that the assessment of the actual cost of the work was invalid. (*Miller v. Portland*, 165.)

Municipal Corporations—Public Work—Contractor's Bond—Beneficiaries.

4. Construing liberally, as it should be, Laws of 1903, page 256, Section 6266, L. O. L., entitled "An act to protect subcontractors, materialmen, and laborers furnishing material for doing work upon * * public works," and requiring every original contractor for public work to execute a bond to pay "all persons supplying him * * labor or materials * * for the work, and providing that anyone applying for a copy of the bond, and making affidavit "that labor or materials for the prosecution of such work has been supplied by him," and not paid for, shall be furnished with a copy, and "said person * * supplying such labor or materials shall have a right of action" on the bond, inures to the benefit of one hauling materials under contract with a subcontractor. (*Portland v. New England Casualty Co.*, 195.)

Municipal Corporations—Streets—Automobile Accident—Last Clear Chance.

5. Where defendant drove his automobile into plaintiff, whose own negligence had put him in peril, defendant was not liable under the

doctrine of last clear chance unless he actually did discover plaintiff's danger in time to avoid the accident, not merely because he should have so discovered the danger. (*Twitchell v. Thompson*, 285.)

Municipal Corporations—Validity of Street Assessment on Nonabutting Property.

6. The illegal assessment for a street improvement that includes a levy against a nonabutting lot does not render void a valid assessment against property otherwise legally liable. (*Birnie v. La Grande*, 531.)

Municipal Corporations—Validity of Reassessment for Street Improvement.

7. Under City Charter of La Grande, 1909, Section 35, paragraph 9, the city is required to give notice of any proposed street improvement to the owners affected, and having omitted to give such notice, the assessments were held invalid, and any subsequent reassessment under the provisions of said section was also invalid, for the reason that the notice required by the charter was a condition precedent to securing jurisdiction to make the improvement. (*Birnie v. La Grande*, 531.)

Municipal Corporations—Initiative Petition—Effect of Adopting Charter by Commissioners.

8. By Article XI, Section 2, of the Constitution of Oregon, the legal voters of every city and town are granted authority to adopt, amend or repeal their municipal charter, subject only to the Constitution and criminal laws of the state, and where by an initiative petition of the legal voters of the city of La Grande a new charter was presented to the city recorder demanding that it be submitted to a vote at an election to be held later, the act of the commissioners passing an ordinance adopting such charter is not an enactment of such charter, but amounts only to an approval thereof, for the reason that Section 3482, L. O. L., does not provide that the ordination of a city charter or an amendment thereto would have the effect of enacting the same into a law, but it is in the nature of a recommendation approving such charter or amendment, thereby signifying that no competing amendment as provided in said section was necessary. (*Birnie v. La Grande*, 531.)

MUTUAL RIGHTS.

See Joint Adventures, 2.

NAVIGABLE WATERS.

Navigable Waters—Log Boom—Pleading—Federal Authority.

1. Where defendant, while denying complainants' ownership, did not affirmatively plead title to the lands in question, and alleged that the boom was situated upon its own land and the waters of the river and bay, and was maintained under license from the federal government, without setting out the terms of such license, it could not be presumed that it empowered defendant to prevent the tide-water owner from access to navigable waters in front of his land. (*Fellman v. Tidewater Mill Co.*, 1.)

Navigable Waters—State Tide-lands—Title—Low-water Mark.

2. Deeds conveying all the tide-lands in front of the lots mentioned therein extended the title thereunder to low-water mark, wherever that might be, then or afterward. (*Fellman v. Tidewater Mill Co.*, 1.)

Navigable Waters—Tide-lands—Accretion.

3. The purchaser of tide-water lands, taking to low-water mark, acquires title to accretions gradually forming upon his original grant. (*Fellman v. Tidewater Mill Co.*, 1.)

NEGLECT.

Negligence—Questions for Jury.

1. While mere proof of an accident ordinarily raises no presumption of negligence, yet, where it is accompanied by proof of facts and circumstances from which an inference of negligence may or may not be drawn, the case must be submitted to the jury. (*Adams v. Corvallis & E. R. Co.*, 117.)

See Master and Servant, 18.

See Reformation of Instruments, 2.

See Waters and Watercourses, 2.

NONSUIT.

See Appeal and Error, 5, 6.

See Judgment, 9.

See Trial, 2.

NOTICE.

See Appeal and Error, 10.

See Corporations, 3.

See Garnishment, 1, 2.

See Mines and Minerals, 2.

See Pledges, 2.

OFFICIAL DUTIES.

Compelling Performance of.

See Mandamus, 7.

ORDINANCES.

See Municipal Corporations.

OREGON CASES.

Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume.

See Table in Front of this Volume.

OREGON CONSTITUTION.

Cited and Construed in this Volume.

See Table in Front of this Volume.

OREGON STATUTES.

Cited and Construed in this Volume.

See Tables (Code and Session Laws) in Front of this Volume.

PAROL CONTRACTS.

Oral Contract for the Sale of Land.

See Specific Performance, 1-3, 5.

See Statute of Frauds, 4.

PAROL EVIDENCE.

See Evidence, 1, 4, 13, 14.

See Mortgages, 1.

See Statute of Frauds, 5.

PARTIES.

See Mandamus, 8.

PARTNERSHIP.

Partnership—Accounting Between Partners—Evidence.

1. Evidence *held* to show an accounting had been made between partners prior to the death of one. (York v. Dalton, 304.)

Partnership—Actions for Accounting—Evidence.

2. Evidence *held* to sustain the findings of the court in an action for an accounting against a member of the former partnership. (York v. Dalton, 304.)

See Corporations, 6.

See Joint Adventures, 3.

PAYMENT.

Payment—"Voucher."

1. A "voucher" is an instrument that shows on what account, or by what authority, a particular payment of money is made, or that services of payee entitle him to the payment, and canceled checks are not vouchers, as they would not show such existence. (Camp & DuPuy v. Lauterman, 134.)

See Bills and Notes, 2.

PERSONAL INJURIES.

See Damages, 1.

See Jury, 1.

See Master and Servant, 1-22.

See Municipal Corporations, 5.

See Venue, 2.

PLEA IN ABATEMENT.

See Abatement and Revival, 1.

PLEADING.**Pleading—Complaint—Sufficiency.**

1. Where no objection to the sufficiency of the complaint is made until the introduction of evidence, it is entitled to all the intendments in its favor, which could be invoked after a decision on the merits of the controversy. (*Cooper v. Hillsboro Garden Tracts*, 74.)

Pleading—Complaint—Sufficiency—Objection to Evidence.

2. In a suit to rescind a contract for the purchase of land on the ground of misrepresentations, the complaint, which in addition to a detailed specification of the statements made by defendant averred that they were false and known to be false at the time made, that they were made for the purpose of inducing the plaintiff to purchase the land, and that plaintiff entered into the agreement relying on the representations, and would not have done so had he known their falsity, is sufficient, when not attacked until the introduction of evidence, though not specifically pointing out wherein the representations were untrue. (*Cooper v. Hillsboro Garden Tracts*, 74.)

Pleading—Complaint—Demurrer—Discretion of Trial Court.

3. Whether a defendant demurring to the complaint shall be permitted to answer over rests in the discretion of the trial court, and, if leave is granted, an answer may be filed controverting the allegations of the complaint. (*Yeaton v. Barnhart*, 249.)

Pleading—Form of Allegation—Fact or Conclusion.

4. Allegations, in a suit to enjoin the collection of school taxes by levy and sale, that the defendant school districts levied the special school tax against the plaintiff's property in the districts; that the special school levies were unauthorized and void; that no legal notice of the meeting of the voters was given; that at the meetings to vote the tax persons who were not legal voters voted on the motion to levy the tax, without showing whether they voted for or against the tax or in such numbers as would affect the result; that every act of the districts in levying the tax was void; that the acts of the county clerk, in extending the levy on the tax-rolls was illegal and void—stated merely conclusions of law, and tendered no issue. (*Davin Land Co. v. School Dist. No. 71*, 273.)

Pleading—Sufficiency of Complaint—Aided by Verdict.

5. Under such provision, a complaint alleging that defendant unlawfully went on plaintiff's land and cut and removed trees, but not alleging that such acts were done willfully or intentionally, not challenged by a demurrer, was sufficient after verdict, as a verdict, while not supplying a material averment, will cure a defective statement. (*McHargue v. Calchina*, 326.)

Pleading—Liberal Construction.

6. A complaint, not challenged by demurrer, should be liberally construed. (*McHargue v. Calchina*, 326.)

Pleading—Judgment on Pleadings—Denial of Immaterial Allegation—Reply.

7. Where the defenses of contributory negligence and assumption of risk pleaded were not available, though the reply thereto was

insufficient, there was no error in refusing judgment on the pleadings, since a denial of an immaterial allegation raises no issue. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

Pleading—Written Instrument—Attachment.

8. Where a copy of any writing, designated as an exhibit, or otherwise sufficiently identified in a pleading, is attached thereto, the effect of the instrument so displayed is the same as though it were incorporated in the body of the pleading. (*Somers v. Hanson*, 429.)

Pleading—Allegations—Conclusions—Fraud.

9. A complaint, in suit to reform an instrument for mistake of one party caused by the fraud of another which makes a mere general averment of fraud, is not good, since the facts upon which fraud is predicated must be specifically pleaded. (*Hyde v. Kirkpatrick*, 466.)

Pleading—Allegations in Complaint Admitted in Answer.

10. Where the complaint alleged full compliance with Laws of 1913, page 272, Section 5, relating to firm names, and defendant's answer admits such allegations to be true, such admission relieves plaintiff from proving the allegation admitted, the same being considered conclusive evidence of such facts. *Beamish v. Noon*, 76 Or. 415 (149 Pac. 522), followed. (*Schucking v. Young*, 483.)

Pleading—Admissions Obviate Necessity of Further Proof.

11. Where, in an action for the purchase price of material, defendant's counsel admitted during the trial that the amount of lumber described in the complaint, the reasonable value and the amount alleged in the complaint, was delivered, there was no necessity of any further proof concerning the amount of lumber, the delivery or its value. (*Metzler Lbr. Co. v. Farmers' Mercantile Co.*, 551.)

See Appeal and Error, 23.

See Bills and Notes, 5.

See Cancellation of Instruments, 1.

See Executors and Administrators, 3.

See Master and Servant, 17.

See Mines and Minerals, 1.

See Navigable Waters, 1.

See Sales, 7, 8.

PLEDGES.

Pledges—Evidence—Conversion of Collateral.

1. In a suit brought to declare a deed a mortgage and to foreclose the same, evidence examined and held sufficient to warrant a finding to the effect that defendants, who had assigned as collateral security a purchase money mortgage and the notes secured thereby, ratified in plaintiff the title acquired from the purchaser, and therefore could not recover the difference between their indebtedness to plaintiff and the amount of the collateral notes, on the ground that the taking of such deed amounted to a conversion of the collateral. (*First Nat. Bank v. Seawear*d, 567.)

Pledges—Notice of Change in Security Pledged as Collateral.

2. As bearing upon the question of ratification, defendants, who had information that the security had been changed in some manner,

and are therefore chargeable with all the facts they might have discovered by making the slightest inquiry. (Citing *McLeod v. Despain*, 49 Or. 536 (90 Pac. 492, 124 Am. St. Rep. 1066, 19 L. R. A. (N. S.) 276). (First Nat. Bank v. Seawear, 567.)

Pledges—Must Act Promptly in Making Election to Abide by or Repudiate Transaction.

3. Defendants having information that plaintiff had surrendered the notes and mortgage pledged as collateral and accepted a conveyance to the premises from the purchaser, it was their duty to act promptly in making their election to abide by or repudiate the transaction. (First Nat. Bank v. Seawear, 567.)

Pledges—Delay of Three Months Will Constitute Waiver to Treat as Conversion.

4. Conceding there was a conversion, and defendants having the option either to repudiate plaintiff's acts and bring an action at law in trover for damages, or to adopt same and hold plaintiff as a trustee for their benefit, their delay for three months before demanding a surrender of the collateral amounted to a waiver to treat the transaction as a conversion, and the plaintiff is exonerated from such charge. (First Nat. Bank v. Seawear, 567.)

POSSESSION.

See Executors and Administrators, 10.

See Specific Performance, 4.

PRESUMPTION.

See Evidence, 5.

See Joint Adventures, 1.

See Master and Servant, 12, 16.

See Principal and Agent, 3.

See Trespass, 2.

PRINCIPAL AND AGENT.

Principal and Agent—Authority of Agent.

1. A transfer company, authorized to deliver household goods to a particular railroad company for shipment has no authority to consent to a reduction of the carrier's common-law liability, and the agreement reducing the liability is not binding on the shipper. (Grice v. Oregon-Wash. R. & N. Co., 17.)

Principal and Agent—Waivers—Ratification.

2. For a waiver of liability made by a drayman to an express company to become binding on a shipper by ratification, the company must show that the shipper was fully advised regarding the waiver soon enough to have rejected it. (Grice v. Oregon-Wash. R. & N. Co., 17.)

Principal and Agent—Custody of Goods—Presumption—Waiver to Express Company.

3. Custody of goods at the moment of shipping is not such indicia of authority that agency to waive liability on the part of an express

company by which he is shipping them will be presumed. (*Grice v. Oregon-Wash. R. & N. Co.*, 17.)

Principal and Agent—Notes—Persons Liable.

4. Defendant, who signed a note, "Hanson Bros., by Erastus Hanson," cannot be held personally liable, it not being alleged that Hanson Bros. was a partnership of which defendant was a member, for defendant's signature was that of an agent of a disclosed principal. (*Somers v. Hanson*, 429.)

See Statute of Frauds, 1.

PROCESS.

See Corporations, 4, 5.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, 1-4.

PURE FOOD LAW.

See Food, 2, 3.

QUESTIONS FOR JURY.

See Appeal and Error, 4, 6, 13, 19, 26, 26b.

See Evidence, 2.

See Master and Servant, 1, 3, 7.

See Negligence, 1.

See Sales, 6.

RATIFICATION.

See Principal and Agent, 2.

REASSESSMENT.

Validity of Reassessment for Street Improvement.

See Municipal Corporations, 6, 7.

REBUTTAL.

See Evidence, 12.

See Trespass, 2.

RECEIVERS.

Receivers—Nature of Officer.

1. A receiver is a ministerial officer of the court of equity which appoints him, presumed to be indifferent to the parties of the suit; and holding the property for all parties interested; his title and possession being that of the court. (*Northern Brewery Co. v. Princess Hotel*, 453.)

Receivers—Sales—Confirmation.

2. A receiver being a ministerial officer, his sale of mortgaged personalty must be confirmed by the court in order to be valid. (*Northern Brewery Co. v. Princess Hotel*, 453.)

See Appeal and Error, 25.

RECORDING.

See Sales, 1, 2.

RECORDS.

See Appeal and Error, 16, 17, 28, 29.

See Contempt, 2.

See Evidence, 9.

See Judgment, 4.

REFORMATION OF INSTRUMENTS.**Reformation of Instruments—Mutuality of Mistake.**

1. Where plaintiff, suing to reform an instrument whereby he sold his stock of groceries, was not mistaken when making the contract about any of the terms included therein, he could not have a reformation thereof, since only mutual mistake of the parties will authorize correction of a written instrument. (Hyde v. Kirkpatrick, 466.)

Reformation of Instruments—Mistake Due to Negligence.

2. Where plaintiff's mistake, as to a term of the written contract whereby he transferred to another his stock of groceries, was the result of his own heedlessness and inattention, since, though possessed of written evidence of the data that should have been used to make up the written agreement, he neglected to avail himself of it for purposes of comparison, he could not have a reformation of the instrument. (Hyde v. Kirkpatrick, 466.)

Reformation of Instruments—Fraud.

3. Plaintiff, suing to reform his written conveyance of his stock of groceries claiming that through his transferee's fraud he had been mistaken about a term thereof, could have such reformation only if the transferee had made a knowingly false representation, which plaintiff believed, relied on and was deceived by, as to a matter relating to the contract, which, if true, would have been to his advantage, but, being false, caused him damage. (Hyde v. Kirkpatrick, 466.)

Reformation of Instruments—New Contract—Power of Chancellor.

4. Where plaintiff, by suit to reform a contract for the sale of his stock of groceries, sought to recast the agreement according to what had been paid and what remained unpaid by the defendant, while the instrument drawn in question was the reduction to writing by the parties of the contract of sale as first orally made between them, plaintiff could not have a reformation, since the chancellor cannot make a new contract taking into consideration payments or other part performance, but can only state the agreement in the terms stipulated as of the date when the original was made. (Hyde v. Kirkpatrick, 466.)

Reformation of Instruments—New Agreement—Power of Equity.

5. While, in a proper case, equity will relieve a party from a contract into which he has been inveigled by fraud, it will not construct a new agreement between the parties for such reason. (Hyde v. Kirkpatrick, 466.)

Reformation of Instruments—Mutuality of Mistake.

6. Where plaintiff orally contracted to sell his stock of groceries, and the contract was later reduced to writing, being at all times in

possession of the original data upon which the agreement was based, he could not have reformation of the instrument on the ground that the writing did not correctly embody the oral agreement, since there was no mutuality of mistake; it being plaintiff's duty as an independent contracting party to see that the writing correctly stated the terms of the contract. (*Hyde v. Kirkpatrick*, 466.)

RENT.

See Landlord and Tenant, 3.

REPLEVIN.

Replevin—Essentials Necessary to Maintain Action of Claim and Delivery.

1. The action of claim and delivery under Section 283, L. O. L., is purely possessory, and the gist is for the recovery of the possession of personal property wrongfully detained by the defendant and to establish plaintiff's right to possession at the time the action was commenced. (*Reed v. Mills*, 558.)

Replevin—Possession of Bond Under Fraudulent Assignment.

2. In an action to recover possession of a \$1,000 bond under Section 283, L. O. L., plaintiff's reply alleged that the bond had been delivered by defendant to one G.; that such was without consideration, and that the party in possession was only holding it in trust for defendant and subject to his control, and with knowledge of his intent to defraud plaintiff, the motion for nonsuit by defendant at the close of plaintiff's evidence in chief was properly overruled, for the reason an action will lie to recover possession of personal property where defendant has constructive possession as well as actual possession of the property. (*Reed v. Mills*, 558.)

Replevin—Instruction as to Setoff in Action of Claim and Delivery.

3. In an action of claim and delivery, an instruction to the effect that the only issue to be determined is whether plaintiff is entitled to the immediate possession of the personal property, and if so, the fact that plaintiff is indebted to defendant will not authorize defendant, without invoking the proper remedy at law, to take possession of plaintiff's property, and apply it or the proceeds thereof to the payment of his claim, is not erroneous. (*Reed v. Mills*, 558.)

Replevin—Refusal to Give Requested Instruction in Claim and Delivery Action.

4. To give the instruction requested by defendant would authorize a creditor, without applying the remedy of attachment, to unlawfully take possession of his debtor's personal property, and if sold before the action of claim and delivery could be commenced, apply the proceeds to the payment of his own demand, and return to such debtor the surplus, if any remained, which scheme the law will not countenance, and in refusing such instruction no error was committed. (*Reed v. Mills*, 558.)

RESCISSION.

See Corporations, 7, 8.

See Pledges, 4.

Rights and Remedies of Purchaser.

See Vendor and Purchaser, 1-6.

RES GESTAE.

See Evidence, 8.

RES JUDICATA.

See Judgment, 6, 7, 12.

REVERTER.

See Highways, 1.

REVIEW.

See Appeal and Error, 3-5, 7, 8, 13-15, 20, 30, 31.

SALES.

Sales—Conditional Sales—Recording—Place for Recording.

1. Under Rem. & Bal. Code Wash., Section 3679, providing that articles of incorporation shall state the name of the city, town or locality and county in which the principal place of business of the company is to be located, and Section 3670, providing that conditional sales shall be absolute as to purchasers in good faith unless within ten days after taking possession by the vendee a memorandum of the sale shall be filed in the auditor's office of the county wherein the vendee resides, and the decisions of the Supreme Court of Washington that the residence of a corporation is the city and county named in its articles of incorporation as its principal place of business, a conditional sale to a Washington corporation of machinery and equipment to be installed in a sawmill was void as against a purchaser in good faith, where, though the contract was recorded in the county in which the sawmill was situated, it was not recorded in the county designated in the articles of incorporation as the principal place of business of the corporation. (*Montesano Lbr. Co. v. Portland Iron Wks.*, 53.)

Sales—Conditional Sales—Recording—"Purchaser."

2. Where, under a lease of a sawmill, the lessee was to pay a specified monthly rental, and pay \$10,000 in advance in machinery and equipment, and it was provided that upon the installation of such machinery and equipment it should be and become the property of the lessor, the title to the machinery and equipment vested in the lessor at the moment it was installed by the terms of the lease, whether or not it was so permanently attached to the building as to become a fixture, and the lessor was a "purchaser" thereof within Rem. & Bal. Code Wash., Section 3670, making conditional sales absolute as to purchasers unless a memorandum of the sale is filed in the auditor's office of the county of the vendee's residence. (*Montesano Lbr. Co. v. Portland Iron Wks.*, 53.)

Sales—Special Use—Implied Warranty.

3. Where a second-hand automobile was sold as fit for the purchaser's stated purpose of using it in his grocery business, there was an implied warranty that it was reasonably suitable for that purpose. (*Bouchet v. Oregon Motor Car Co.*, 230.)

Sales—Construction of Contract—When Character “#” Signifies “Pounds.”

4. In a contract reciting that the grower has sold and agreed to deliver to the plaintiff “25,000 # of 1913 hops at 14 cents per pound,” the hieroglyphic “#” when placed before a figure imports “number,” and when placed after a figure signifies “pounds.” (Schucking v. Young, 483.)

Sales—Breach of Contract—Buyers Offer to Perform.

5. By the terms of a contract for the sale of hops in which the seller agreed to deliver the hops on cars in Oregon, at the point selected by him, but before such delivery would be complete, plaintiff was required to inspect and receive them, upon written notice from plaintiff demanding that he be permitted to inspect and receive the hops, and at same time gave defendant notice that upon such inspection he would pay the full purchase price, such notice being wholly ignored by the defendant, amounted to a refusal to comply with the terms of such contract. (Schucking v. Young, 483.)

Sales—Evidence of Ability of Buyer to Comply With Contract is Question for Jury.

6. Evidence in an action by a buyer for breach of a contract to sell and deliver certain hops examined, and held sufficient to authorize submitting to the jury the question whether plaintiff would have been able to have paid the contract price, if his offer to inspect and receive the hops had been accepted. (Schucking v. Young, 483.)

Sales—Breach of Contract—Variance Between Pleadings and Proof.

7. In an action for breach of a contract to sell and deliver a certain number of pounds of hops, it was alleged in the first paragraph of the complaint that plaintiff was doing business in the name of a firm, and in the second paragraph that the contract was entered into with the firm, and as shown by the contract introduced in evidence the firm was the buyer, there is no such variance as could have misled defendant to his prejudice, within Section 97, L. O. L. (Schucking v. Young, 483.)

Sales—Evidence as to Price Admissible Under Pleadings.

8. In an action for the purchase price of lumber, though plaintiff sued on an implied contract, it was not error for testimony to be admitted tending to prove that the lumber was to be furnished at certain rates, since, when under a complaint based on a *quantum meruit*, testimony is received tending to prove a contract for the amount demanded, the sum disclosed by such evidence will be construed as the reasonable value, in order to effectuate substantial justice. (Metzler Lbr. Co. v. Farmers' Mercantile Co., 551.)

Sales—Instructions in an Action for Price of Material Approved.

9. In an action by the Metzler-Hegsted Lumber Company, a corporation, for the purchase price of lumber that defendant claimed was sold to a contractor and not to it, when there was no allegation that the Metzler-Hegsted Lumber Company and Metzler & Hegsted were one and the same institution, it was not error to instruct the jury that the bond given by Metzler & Hegsted as surety for the contractor could not affect plaintiff, because it was not a party to the instrument,

and could be considered only in determining whether plaintiff had knowledge of the contract between defendant and the contractor, and to contradict the testimony of plaintiff's president, who testified that the lumber was furnished at defendant's special instance and request. (*Metzler Lbr. Co. v. Farmers' Mercantile Co.*, 551.)

See Chattel Mortgages, 1.

See Executors and Administrators, 1-9.

See Receivers, 2.

SCHOOLS AND SCHOOL DISTRICTS.

Schools and School Districts—Dissolution of Districts—Constitutional and Statutory Provisions.

1. Session Laws of 1915, page 54, Section 2, providing for the dissolution of union high school districts by a vote of the voters of the districts forming the union school district and prescribing the procedure to be followed, does not violate Article XI, Section 2 of the Constitution, providing that the legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town, and that the legal voters of every city and town are thereby granted power to enact and amend their municipal charter, since this provision does not extend to school districts which have no charters, but depend for their existence upon the general laws of the state. (*State v. School Dist. No. 3*, 188.)

Schools and School Districts—Dissolution of Districts—Constitutional and Statutory Provisions.

2. There is nothing in the Constitution prohibiting the legislature from passing a general law providing the manner whereby a *quasi* municipality, such as a school district, may be dissolved. (*State v. School Dist. No. 3*, 188.)

Schools and School Districts—Dissolution of Districts.

3. A *quasi* municipality, such as a school district, can be dissolved only in the manner prescribed by law, and its inhabitants are powerless to dissolve it, unless this be done as the law directs. (*State v. School Dist. No. 3*, 188.)

Schools and School Districts—Dissolution of Districts—Constitutional and Statutory Provisions.

4. Laws of 1915, page 54, Section 2, relative to the dissolution of union high school districts, does not violate Article IV, Section 1a of the Constitution, providing that the initiative and referendum powers are thereby reserved to the legal voters of every municipality and district as to all local, special and municipal legislation, and that the manner of exercising such powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising such powers as to their municipal legislation, since it is in accordance with the spirit of this provision for the legislature to provide the method by which a school district or other *quasi* municipal corporation may vote upon a matter of purely local concern. (*State v. School Dist. No. 3*, 188.)

Schools and School Districts—Dissolution of Districts—Constitutional and Statutory Provisions.

5. Laws of 1915, Chapter 40, Section 2, relative to the dissolution of union high school districts, is not repealed by Laws of 1915, Chapter 78 Or.—46

ter 211, providing a method whereby an incorporated city, town or municipal corporation may surrender its charter and disincorporate, as this does not relate to the same matters as Chapter 40, and does not displace it or conflict with it. (State v. School Dist. No. 3, 188.)

Schools and School Districts—Boundaries—Change of.

6. Article IV, Section 1a, of the Constitution, declares that the initiative and referendum powers are reserved to the legal voters of every municipality and district, in and for their several municipalities and districts. Article XI, Section 2, declares that corporations may be formed under general laws, and that no charter of any municipality, city, or town shall be amended or repealed by the legislature, but that the legal voters may enact or amend their charters. Section 4021, L. O. L., provides for changing the boundary of school districts by the district boundary board. This statute was in force prior to the adoption of Article XI, Section 2, of the Constitution. *Held* that, as the statute which was part of the general law formed the charter, if there was one, of the school district, changes might be made by the district boundary board according to the statute without submitting the matter to the electorate; the change not being made by the legislative assembly. (School Dist. No. 35 v. Holden, 267.)

Schools and School Districts—Contracts—Construction of Buildings—Liability.

7. Plaintiff contracted with defendant to build a school building for a specified sum, and agreed that no extras should be added except upon the signed order of the architect. The defendant had been authorized to issue bonds in the sum of \$50,000 to pay for the improvement. After deducting the sum of the plaintiff's original contract, there was less than enough money remaining from the sale of the bonds to pay for the contracts entered into in the construction and for extras ordered by the architect of the plaintiff. *Held*, that plaintiff could recover for the extras furnished, since he had a right to rely on the school board's keeping further expenditures, aside from his contract, within the appropriation, and as his contract was valid when executed, action of the board in exceeding the appropriation in other details could not prevent his recovery. (Rush v. School District No. 5, 435.)

Schools and School Districts—Removal of Teacher.

8. Laws of 1913, Chapter 37, page 69, providing for the employment of school teachers, for the creation of a permanent list of teachers, and for their removal after written notice and a hearing, taken in connection with Laws of 1913, Chapter 172, pages 299, 304, Section 1, subdivision 22, authorizing school boards to dismiss teachers only for good cause, limit the power of dismissal to reasonable causes. (Richards v. District School Board, 622.)

Power of School Boards to Enlarge Statutory Contract.

9. A school board has not authority to add to a teacher's contract of employment provisions as to the term or conditions of service beyond those found in the statutes defining the powers of the board. (Richards v. District School Board, 622.)

Schools—Marriage as Reason for Dismissing Teacher.

10. The dismissal of a teacher because of becoming married is an arbitrary and capricious act, in violation of a statute giving school

boards the right to dismiss teachers for reasonable cause. (*Richards v. District School Board*, 622.)

See Statutes, 5.

SECONDARY EVIDENCE.

See Evidence, 3.

SESSION LAWS OF OREGON.

See Table in Front of this Volume.

SETOFF AND COUNTERCLAIM.

Setoff and Counterclaim—Query, Right to Separate Claim of Codefendant.

1. Plaintiff having joined as defendants both the pledgors and the mortgagors, the latter not having been injured and no allegation being made that plaintiff was insolvent, it is doubtful whether the pledgors can set up an alleged conversion as a counterclaim, in view of Section 401, L. O. L., providing that the counterclaim of the defendant must be one upon which suit might be maintained by defendant against the plaintiff. (*First Nat. Bank v. Seaward*, 567.)

See Replevin, 3.

SPECIFIC PERFORMANCE.

Specific Performance—Parol Contract for Sale of Land—Part Performance.

1. The taking possession of real estate pursuant to an oral contract for the sale thereof is such part performance as will take the contract out of the statute of frauds unless the relation of affinity or consanguinity exists between the vendor and purchaser, in which case the making by the purchaser of valuable improvements in addition to the taking of possession is essential to specific performance of the contract. (*Stalker v. Stalker*, 291.)

Specific Performance—Parol Contracts—Evidence—Sufficiency.

2. Evidence held to justify a finding that a husband orally contracted to convey land to his plural wife, and that she took possession of the land relying on the contract and made valuable improvements thereon authorizing her heirs to compel specific performance. (*Stalker v. Stalker*, 291.)

Specific Performance—Oral Contract—Weight and Sufficiency of Evidence.

3. In an action for the specific performance of an alleged oral contract for the sale of land, the terms of the agreement must be shown by full, complete and satisfactory proof; but proof beyond a reasonable doubt is not required. (*Goff v. Kelsey*, 337.)

Specific Performance—Contracts Enforceable—Possession and Improvement.

4. In such case, where the son-in-law took possession of the premises with the intention of carrying out the contract, and, because of the contract, made valuable permanent improvements, a court of

equity would be warranted in enforcing the contract. (*Goff v. Kelsey*, 337.)

Specific Performance—Sufficiency of Evidence—Oral Contract.

5. Evidence, in an action for specific performance of a contract to sell an interest in land when an irrigation ditch was completed, and to credit plaintiff with any money advanced or any work done on the construction of the ditch, *held* not to clearly establish the terms of the contract, or that plaintiff's possession and work was referable to any contract for the sale of the land. (*Goff v. Kelsey*, 337.)

STATE ROADS.

See Statutes, 8.

STATUTE OF FRAUDS.

Statute of Frauds—Authority of Agent—Agreement.

1. Section 804, L. O. L., declares that no estate or interest in land, nor any trust or power concerning such property can be created, transferred or declared except by operation of law, or by a conveyance in writing subscribed by the party or by his lawful agent under written authority, Section 808 provides that agreements for employment of a broker to sell land shall be void unless in writing, and that agreements relating to land shall be void unless in writing signed by the party to be charged or his duly authorized agent whose authority shall be in writing. A written agreement, authorizing an agent to sell land did not empower him to agree to restrictions on the remaining property of the vendor, but in plain terms reserved to the vendor the right to modify the prices, terms and conditions. *Held*, that as the purchaser was bound at his peril to ascertain the agent's authority, an agreement by the agent that the remaining property of the vendor should be subject to the same restrictions imposed on the property conveyed is void. (*Roberts v. Lombard*, 100.)

Statute of Frauds—Requisites of Memorandum—Sale—Price.

2. In an agreement of sale the memorandum must contain the full terms of the contract, and state the price, though if it recites that the price has been received, or if no price is named in the contract, or if the property has been sold for what it is reasonably worth, a statement of the price is unnecessary. (*Taggart v. Hunter*, 139.)

Statute of Frauds—Requisites of Memorandum—Consideration.

3. The memorandum required by the various subdivisions of the statute of frauds (Section 808, L. O. L.) is not the contract itself, but is only evidence of the contract, showing the terms and parties, and if the law imports a consideration for a contract within the statute, no consideration need be stated in the memorandum. (*Taggart v. Hunter*, 139.)

Statute of Frauds—Interest in Land—Relationship.

4. Under an oral contract to sell an interest in land to a son-in-law, proof of his possession under such contract was not enough, of itself, to avoid the statute of frauds as between relatives. (*Goff v. Kelsey*, 337.)

Statute of Frauds—Parol Evidence of Contract to Pay for Property in Particular Way.

5. Where evidence established the fact that one defendant had contracted in writing for the purchase of certain property from the maker of the note sued on and as a part of the purchase price assumed payment of said note, the statute of frauds did not prevent the introduction of parol evidence to show that he acted for himself and two others jointly in the transaction; the agreement whereby he assumed such payment being a contract to pay for the property in a particular way, and not a contract to answer for and pay the debt of another. (*Riddle State Bank v. Link*, 498.)

See *Brokers*, 1, 3.

STATUTES.**Statutes—Title—Sufficiency.**

1. The title of Laws of 1907, page 293, entitled an act to amend enumerated sections of the Code and statutes and providing for liens in favor of any person performing labor on or furnishing materials or supplies for the operation of any mine, and regulating the priority of such liens, and of Laws of 1911, page 193, entitled "An act to amend" Section 7447, L. O. L., "to provide for the priority of mortgages and for the posting and recording of the same," are sufficient, within the Constitution, to justify provisions in the body of the acts making liens superior to mortgages. (*Haines Commercial Co. v. Grabill*, 375.)

Statute—Misbranding—Validity—Certainty.

2. Pure Food Law (Laws 1915, p. 568), Section 35, subdivision 3, defining misbranded foods, is not indefinite and uncertain because it cannot be determined whether it refers to food or drugs, since the language of such section, when read in connection with Section 20 (page 564), is broad enough to cover both food and drugs. (*Hoeftler v. Mickle*, 399.)

Statutes—Construction When Followed and Acquiesced in by the Legislature.

3. The act creating the State Industrial Accident Commission, appointing three commissioners at a salary of \$3,600 per annum, payable from a fund provided for by the act, is not in violation of Article IX, Section 7, of the Constitution, for the reason that the act is not an appropriation bill in the sense that bills providing for general current expenses or salaries of the constitutional officers of the state are such. From the year 1860 to the present time, similar laws to the instant act have been passed and a uniform construction of this section of the Constitution in other states having identical or similar provisions in their constitutions, is that it will not prevent the legislature from passing an act for a particular purpose, and in the same act to provide and appropriate the necessary funds to carry the object of the act into effect. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

Statutes—Constitutional Provisions as to Reading Legislative Bills.

4. Under Article IV, Section 19, of the Constitution, requiring all bills to be read by sections on three several days in both the House and Senate, does not require the whole bill, as amended during its

progress through the legislature, to be so read, and such has never been the practice in this state. (*Evanhoff v. State Industrial Acc. Com.*, 503.)

Statutes—Schools—Removal of Teachers.

5. All the provisions of a statute must be given effect if possible, under a reasonable construction; for example, Section 1 of Laws of 1913, Chapter 37, page 69, gives the board of directors of every school district the power to remove and discharge all teachers as it may deem necessary; Section 4 provides that teachers employed in a district as regularly appointed teachers for not less than two successive years shall be placed upon the list of permanently employed teachers; Section 5 that such teachers shall serve until dismissed, subject to the board's rules which shall be reasonable; Section 6 that before dismissal, any teacher on the permanent list shall receive written notice stating the cause, a copy of any charges filed, and, on request, shall be entitled to a hearing before the board; and Section 11 repealed all acts in conflict therewith. These sections must all be read with reference to each other, and mean that the school board has the power to dispense with the services of all teachers, but must proceed in the manner pointed out by the statute—it has no power to remove without a hearing, and for an arbitrary or capricious reason. (*Richards v. District School Board*, 622.)

Statutes—Title and Subject Matter—Validity.

6. The legislature of 1913, Laws of 1913, page 663, passed an act creating the office of state highway engineer, and prescribed what his duties were. The county court of Clatsop County and plaintiffs entered into a contract whereby the latter agreed to build and did construct certain roads, such contract specifying that the state highway engineer was to make a final estimate of the work performed thereunder and the value of said work, and that after approving the estimate so prepared the county was to pay for the work. After the contract was entered into, and before the completion of the work, the legislature of 1915, Laws of 1915, page 537, passed a law entitled, "An act abolishing the office of state highway engineer," etc., and providing that the duties performed by such officer be transferred to the state engineer, and further providing for the appointment of a deputy state engineer by the chairman of the state highway commission, and that such deputy shall be qualified and versed in scientific road building, and shall perform the duties prescribed by the state highway commission, and fixes his salary and provides for expenses. *Held*, that Laws of 1915, page 537, Section 3, was void as being repugnant to the title of the act, under Article IV, Section 20, of the Constitution. (*Peterson v. Lewis*, 641.)

Statutes—Construction of a Partial Invalid Statute.

7. In construing a statute, the rule is to give such a meaning, if possible, as will render it valid and effectuate the will of the legislature, and where a part of an act is valid and conforms to the policy and intent of the legislature, it is not rendered unconstitutional by a later section that is repugnant and void to this policy and intent, and in such a case the statute is void only as to that section. (*Peterson v. Lewis*, 641.)

Statutes—Duty of State Engineer in the Construction of Highways and State Roads.

8. The act of 1913, Laws of 1913, page 663, as amended by Laws of 1915, page 537, provides that the state engineer is substituted for the state highway engineer, and all duties prescribed by the statutes referred to pertaining to said official shall be performed by the state engineer, including the duty of assisting the highway commission in the construction of state roads. (*Peterson v. Lewis*, 641.)

See Appeal and Error, 31.

See Bills and Notes, 1.

See Constitutional Law, 6.

See Corporations, 4.

See Evidence, 6, 7.

See False Imprisonment, 1.

See Highways, 4.

See Infants, 1, 2.

See Mines and Mining, 2.

See Schools and School Districts, 1-5.

See Taxation, 1-4.

See Trespass, 1.

STIPULATIONS.

See Carriers, 2.

STREET ASSESSMENT.

See Municipal Corporations, 1-3, 6, 7.

STREETS.

See Municipal Corporations, 5.

SUMMONS.

See Corporations, 4, 5.

TAXATION.**Taxation—Necessity for Estimate of Amount to be Raised Prior to Levy—Statutes.**

1. Laws of 1913, Chapter 234, page 458, provided that it shall be unlawful for any tax to be levied, proposed or adopted, for any county, unless an estimate shall have first been made of the amount of money proposed to be raised as provided therein, and that such estimate shall be fully itemized, showing under separate heads the amount required for each department of county government, county office, or county officer, for each county improvement, the maintenance of each county building, structure or institution, for the salary of each county officer or employee, provided, that employees of like salary in each department of county government may be listed by the number of such employees, the amount of each salary and the amount of their combined salaries, for the improvement and maintenance of public highways, roads, streets and bridges, and for the construction, operation and maintenance of each public utility. *Held* that a substantial and not a technical compliance with the law is re-

quired, and that it is sufficient to state in one item the amount estimated for roads, bridges, supervisor's salaries, and repairs on machinery and supplies, without designating separately the amount for the improvement, and for the maintenance of each public highway and for each road, bridge, street, etc., for such details are not within the mandate of the law, though if a considerable amount of money was to be raised for the construction or improvement of any particular highway or structure, in order to fully inform the taxpayer, it should be mentioned. (State ex rel. v. Hare, 540.)

Taxation—Estimate of Amount Necessary to be Raised Before Levy—Statutes.

2. Laws of 1913, Chapter 234, page 458, requiring an itemized estimate of the amount required to be raised before any tax can be levied for county purposes, and Section 6314, L. O. L., providing that county courts shall appoint a road supervisor for each road district in the county, and Section 6319, L. O. L., providing that every road supervisor shall receive for each day necessarily employed in the performance of his duties, the sum of \$2.50, *held* that road supervisors are road district officers, and not salaried county officers or employees, and payment for their services was properly included in the estimate and under the heading "for expenses of roads and bridges," and no one could be injured by such listing. (State ex rel. v. Hare, 540.)

Taxation—Estimate of Amount to be Raised Sufficiently Complies With Statute.

3. Under Sections 2985, 2987, 6319, L. O. L., and Laws of 1913, Chapter 234, page 458, *held* that in the annual budget or estimate of expenses preceding the county tax levy, an item for salaries, surveys and engineering of the surveyor's office was sufficiently itemized. (State ex rel. v. Hare, 540.)

Taxation—Estimate of "County Expenditures" Enumerated Prior to Tax Levy—Statutes.

4. Under Laws of 1913, page 686, providing that district attorney in each county shall be paid by the state the salary therein specified, *held* that the district attorney's salary was not a county expenditure required to be enumerated in the estimate of county expenses preceding the tax levy as required by Laws of 1913, Chapter 234, page 458. (State ex rel. v. Hare, 540.)

TEACHERS.

Removal of Teachers.

See Mandamus, 5.

See Schools and School Districts, 8, 9.

See Statutes, 5.

TENDER.

Tender—When Coupled With Impossible Conditions Insufficient.

1. A tender, in order to be available, must not be coupled with impossible conditions; therefore, a tender made by a debtor, which was coupled with a demand for the surrender of certain collateral notes which the debtor knew his creditor could not produce, will not be sufficient to stop the running of interest,—citing 27 Cyc. 1407. (First Nat. Bank v. Seawear, 567.)

TIDE-LANDS.

See Navigable Waters, 2, 3.

TITLE.

See Injunction, 1.

See Master and Servant, 23.

See Navigable Waters, 2.

See Statutes, 1, 6.

TORT.

See False Imprisonment, 3.

TRADEMARKS AND TRADE NAMES.**Trademarks and Trade Names—Right to Use Own Name.**

1. While a natural person has an unqualified right to the use of his family name in conducting any business, though such use be detrimental to other individuals of the same name, he cannot combine his name with others for the purpose of working a fraud. (Wood v. Wood, 181.)

Trademarks and Trade Names—Unfair Competition—What Constitutes—"Realty"—"Company."

2. Plaintiffs formed the Wood Realty Company, a firm engaged in the real estate business. Defendant, who had no associate, started business under the name of the W. E. Wood Realty Company. There was some confusion of mails and business, some persons mistaking defendant for plaintiff. *Held*, that the word "realty," which is used as a collective noun for real estate and when used in a firm title indicates brokers engaged in the purchase and sale of real estate, and as the word "company" indicates an associate or partnership, defendant will be restrained from continuing business under such title; the use of his name constituting unfair competition. (Wood v. Wood, 181.)

Trademarks and Trade Names—Suits to Enjoin.

3. In a suit to enjoin the infringement of a trade name, it is not necessary to prove there was a fraudulent intent to deceive. (Wood v. Wood, 181.)

TRANSCRIPT.

See Appeal and Error, 9, 12.

See Contempt, 4.

TRANSITORY ACTION.

See Venue, 2.

TRESPASS.**Trespass—Realty—Damages—Statute.**

1. Under Section 346, L. O. L., making any person, cutting or carrying off trees from the land of another without lawful authority, liable for treble the damages claimed or assessed therefor, the cutting or removal, if accidental, permits a recovery of only actual damages, but,

if willful, is ground for the recovery of treble damages. (*McHargue v. Calchina*, 326.)

Trespass—Realty—Presumption—Rebuttal.

2. In such case, a presumption of an unintentional trespass would arise from a vendor's cutting and removing of trees after his conveyance without reservation, which in an action for the trespass he could rebut only by allegation and proof of some license or authority exempting him from liability. (*McHargue v. Calchina*, 326.)

TRIAL.

Trial—Argument of Counsel.

1. In an action for injury to plaintiff through the negligence of the driver regularly employed by the owner of an automobile, where the issue was whether the driver was acting in the scope of his employment, argument for plaintiff that defendant was trying to beat the plaintiff out of his just deserts and to prevent him from getting justice, that it was an outrage for defendant to say that it had not injured plaintiff, and asking the jury to put themselves in the plaintiff's place, resting upon some basis in the testimony, was not reversible error. (*Kahn v. Home Tel. & Tel. Co.*, 308.)

Trial—Motion for Directed Verdict—Construction as Motion for Nonsuit.

2. Where the complaint alleged defendant's unlawful cutting and removal of trees from plaintiff's land, entitled plaintiff, under Section 346, L. O. L., to treble damages, and for a second cause of action alleged that defendant, before his warranty deed to plaintiff, had conveyed a strip out of the land by warranty deed, and had induced plaintiff to believe that a dwelling was wholly on the premises to be conveyed to him, when in fact it was not, and its removal would cost \$100, and the answer denied each averment of the complaint and alleged that the strip was used as a public highway, defendant's motion for a directed verdict, because of plaintiff's failure to offer evidence sufficient to constitute his causes of action, would be treated as an application for a judgment of nonsuit. (*McHargue v. Calchina*, 326.)

Trial—Taking Case from Jury—Speculative Verdict.

3. In an action by a railroad passenger for his arrest and ejection from defendant's train as intoxicated, and his subsequent imprisonment, which he claimed caused him to undergo a second amputation of his arm, where plaintiff's evidence as to the cause of such second amputation left it a matter of speculation whether the cause thereof was a cold caught in the jail in the unhealed original amputation, or infection from unsterilized bandages, etc., the court should have withdrawn from the jury the subject of the second amputation, as an element in plaintiff's recovery, since, when the evidence leaves the case in such situation that the jury must guess as to which of several possible causes occasioned the injury, such part of the case should be withdrawn from their consideration. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

Trial—Verdict—"Quotient Verdict."

4. A "quotient verdict," reached by the jurors adding their several amounts of recovery and dividing the sum by their number, is illegal. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

Trial—Verdict—Impeachment by Juror.

5. Affidavits of jurors will not be received to impeach a quotient verdict, whether made by members of a unanimous jury or by non-concurring jurors under the statute allowing three fourths of the jurors to return a verdict. (*Spain v. Oregon-Wash. R. & N. Co.*, 355.)

See Equity, 1.

Right to Trial by Jury.

See Constitutional Law, 5.

TRUSTS.

See Equity, 2.

UNDERTAKING.

See Appeal and Error, 1, 2, 29.

UNDUE INFLUENCE.

See Cancellation of Instruments, 1.

UNFAIR COMPETITION.

See Trademarks and Trade Names, 2.

VACATION.

See Judgment, 8.

VARIANCE.

Between Pleadings and Proof.

See Sales, 7.

VENDOR AND PURCHASER.

Vendor and Purchaser—Remedies of Purchaser—Right to Rescind.

1. Where plaintiff, after discovering the falsity of the representations by which he was induced to purchase land, remained in possession for a number of months and then leased the premises before beginning suit, his delay was an affirmation of the contract precluding rescission. (*Cooper v. Hillsboro Garden Tracts*, 74.)

Vendor and Purchaser—Rescission—Right to Rescind.

2. In a suit to obtain rescission of a contract for the purchase of land, evidence held to show that the only misrepresentations were as to matters of opinion. (*Marshall v. Hillsboro Garden Tracts*, 89.)

Vendor and Purchaser—Contracts—Rescission—Right to.

3. A purchaser of land cannot rescind his contract on the ground that specific promises were not kept, where they were made in good faith and there was an attempt to keep them. (*Marshall v. Hillsboro Garden Tracts*, 89.)

Vendor and Purchaser—Actions for Rescission—Evidence.

4. A purchaser of land is not entitled to a rescission of the contract on the ground of misrepresentations, where the misrepresentations con-

sisted of mere opinions or predictions, or of promises which the vendor actually intended and attempted to fulfill. (*Henrickson v. Hillsboro Garden Tracts*, 96.)

Vendor and Purchaser—Dealing at Arm's-length.

5. Where the buyer of farm lands represented to the sellers that he was an experienced farmer, owned a valuable farm in another state, and knew good land when he saw it, the parties dealt at arm's-length, and the contract could not be rescinded for misstatements of the sellers as to the quality of the soil. (*Hegdale v. Wade*, 349.)

Vendor and Purchaser—Rescission—Interest.

6. A purchaser of land who rescinds the contract on the ground of fraud cannot recover interest on a payment made on the price, where he had possession of the land during the time the contract remained in force. (*Hall v. Catherine Creek Development Co.*, 565.)

See Mortgages, 6.

See Sales, 4-7.

See Statute of Frauds, 5.

VENUE.

Venue—Motion for Change of Venue—Absence of Counter-affidavits—Effect.

1. In the absence of counter-affidavits, the contents of the affidavits filed in support of a motion for a change of venue must be taken by the court on appeal as admitted. (*Rugenstein v. Ottenheimer*, 371.)

Venue—Transitory Action—Personal Injury.

2. An action for damages resulting from personal injuries is a transitory, and not a local, action. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

See Appeal and Error, 21.

VERDICT.

Will Cure a Defective Statement.

See Pleading, 5.

Motion for Directed Verdict.

See Trial, 2.

Speculative or Quotient Verdict.

See Trial, 3, 4.

Affidavits of Jurors not Received to Impeach Verdict.

See Trial, 5.

WAIVER.

See Abatement and Revival, 1.

See Contracts, 7.

See Courts, 3.

See Pledges, 4.

See Principal and Agent, 2, 3.

WARRANTY.

See Covenants, 2, 3.

See Sales, 3.

WATERS AND WATERCOURSES.

Waters and Watercourses—Irrigation Ditches—Escape of Water—Overflow—Percolation.

1. In suits to restrain the owners of irrigation ditches from negligently permitting escape of water therefrom, there is no legal distinction between the escape of water by overflow and by percolation, where the cause of escape can be traced to its source and shown to originate in the ditch. (Mallett v. Taylor, 208.)

Waters and Watercourses—Escape of Water—Liability—Negligence.

2. A person who by artificial means causes water to percolate through the soil to the injury of his neighbor does so at his peril, and is legally responsible therefor irrespective of negligence. (Mallett v. Taylor, 208.)

Waters and Watercourses—Irrigation Ditches—Escape of Water—Liability.

3. Where water was caused to percolate into lands adjoining an irrigation ditch because of the negligent failure of the owner of the ditch to construct a waste ditch, he was liable to the owners of the adjoining land for injury caused by his negligence. (Mallett v. Taylor, 208.)

Waters and Watercourses—Irrigation—Improvement of Ditches—Necessity.

4. Evidence *held* to show that improvements in a certain irrigation ditch were necessary so as to create no liability for the alleged lowering of the supply level to land owners. (Jenkins v. Owyhee Ditch Co., 277.)

Waters and Watercourses—Irrigation—Improvement in Ditches—Damages—Evidence.

5. Evidence *held* insufficient to show such damage to the plaintiff as to warrant recovery on account of widening and deepening an irrigation ditch. (Jenkins v. Owyhee Ditch Co., 277.)

Waters and Watercourses—Irrigation—Water Rights.

6. Although improvements in an irrigation ditch lower the level of the water at plaintiff's land, he cannot *ipso facto* compel the irrigation company to raise the level of the water or install a stop-gate, if the improvement generally benefited other users to whose rights plaintiff's rights are in no way superior. (Jenkins v. Owyhee Ditch Co., 277.)

Waters and Watercourses—Irrigation—Water Rights.

7. Where stock in an irrigation company is not issued as an apportionment to the land, the rights of the holders of stock to the use of water are reciprocal, and no stockholder is entitled to greater use of the water than any other. (Jenkins v. Owyhee Ditch Co., 277.)

WITNESSES.**Witnesses—Cross-examination—Scope.**

1. In an action to recover a broker's commission upon a sale of real estate, the cross-examination of the defendant in regard to the delivery of a plat to the plaintiff was not objectionable, where it related strictly to the matter brought out on his examination in chief. (*Taggart v. Hunter*, 139.)

Witnesses—Cross-examination—Scope.

2. In a servant's action for injury from unguarded machinery in a sawmill, defendant introduced a certificate of the state labor commissioner, dated about one year before the injury, that the mill was properly equipped and the machinery protected as required by law, which certificate, under Section 5046, L. O. L., was only *prima facie* evidence of the condition of the sawmill at its date, and where the deputy commissioner testified that he had inspected the mill about a year later, about four days before the accident, it was proper cross-examination to show by the witness that he would not have then passed the mill for renewal; the defendant upon redirect being entitled to show that the defective condition referred to related to other machinery than that in question. (*Ramaswamy v. Hammond Lumber Co.*, 407.)

WORDS AND PHRASES.

- "Adulterated"—*Hoefler v. Mickle*, 399.
- "Adverse Party"—*Barton v. Young*, 215.
- "Circuit Court"—*Montesano Lumber Co. v. Portland Iron Works*, 53.
- "Dependent Child"—*Ex parte Bowers*, 390.
- "Deputy"—*Peterson v. Lewis*, 641.
- "Discretion"—*Fretland v. Cantrall*, 439.
- "Interest"—*Edwards v. Case*, 220.
- "Misbranded"—*Hoefler v. Mickle*, 399.
- "Once a Mortgage, Always a Mortgage"—*Niehaus v. Shetter*, 447.
- "Party"—*Goff v. Kelsey*, 337.
- "Persons Interested"—*Peterson v. Lewis*, 641.
- "Purchaser"—*Montesano Lumber Co. v. Portland Iron Works*, 53.
- "Voucher"—*Camp & DuPuy v. Lauterman*, 134.
- "When Character # Imports Number"—*Schucking v. Young*, 483.
- "When Character # Signifies Pounds"—*Schucking v. Young*, 483.

WORKMEN'S COMPENSATION ACT.

- See Constitutional Law, 3-5.
- See Injunction, 2.
- See Master and Servant, 23, 24.

WRITS.

- See Attachment, 1.
- See Mandamus, 6.

